Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

Melvin E. Blough,

Petitioner

v.

United States of America,
United States Department of the Treasury,
Paul H. O'Neill, Secretary of the Treasury,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT, U.S.

120 pp.

QUESTIONS PRESENTED

"While this Court decides questions of public importance, it decides them in the context of meaningful litigation." *Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 185 (1959). The dynamics of the questions presented are dependant upon recognition of a constitutional obligation; conferring specific rights which are *indebitatus assumpsit* to the totally disabled veteran; whose status is inherent to the constitutional power of Congress to declare war. *United States v. Russell*, S.C., 13 Wall., 623-632 (1871) (citing *Curtis v. Fielder*, 2 Black, 478).

1. Do totally disabled veterans have an inherent Fifth Amendment liberty interest which prohibits continuous acts of employment related threats of physical injury, discrimination and retaliation by the United States Government ?

2. Title VII section 712 of the Civil Rights Act of 1964, as amended, states that "Nothing contained in this title shall be construed to repeal or modify any *Federal*, State, territorial, or local *law creating special rights* or preference *for veterans*". In *Brown v. General Services Administration*, 425 U.S. 830, 836 (1976) this Court held that "(Title VII) section 717 of the Civil Rights Act of 1964, as amended, provides the exclusive judicial remedy for claims of discrimination in federal employment."

The question presented is:

Does recognition of the constitutional right as stated in question number one; provide a *special right* (under Title VII section 712 of the Civil Rights Act of 1964) of exception to the exclusive judicial remedy inferred by this Court in *Brown v. General Services Administration*, supra. ?

3. Based upon the judicial standard presented in *Parham v. J.R.*, 442 U.S. 584, 609 (1979); the inherent Fifth Amendment liberty interests of totally disabled veterans cannot be judicially divorced from the attached due process interest which inures under the Constitution.

The question presented is:

Did the lower courts abuse their constitutional authority in the judicial abstention of that process which is due the constitutional obligation and statutory exception presented as questions number one and two ?

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JURISDICTION

Jurisdiction of this Court is invoked under Title 28 U.S.C. section 1254(1) as to the judgment of May 22, 2001 by the United States Court of Appeals for the Eleventh Circuit.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The constitutional provisions involved are the War Powers Clause, art. 1, section 8, cl. 11, 12, 18; the Jurisdiction of Courts Clause, art 3, section 2, cl. 1; and the Fifth Amendment. The public laws and statutes involved are Public Law 78-359 (Veterans Preference Act of 1944); Public Law 85-857 (Veterans Benefits) and Title 38 U.S.C. Veterans Benefits; Public Law 88-352 (Civil Rights Act of 1964); Public Law 92-261 (Equal Employment Opportunity Act of 1972); Title 42 U.S.C. Chapter 21 - Civ ilRights Subchapter VI - Equa lEmployment Opportunities; Title 28 U.S.C. Judiciary and Judicial Procedure sections 1254, 1291, and 1331. Rules involved are Rule 15(a) and 54(b) of the Federal Rules of Civil Procedure, and Rule 10(a) and (c) of the Rules of the United States Supreme Court. All constitutional provisions, public laws, statutes, rules involved appear in App. A at 27-35.

STATEMENT OF CASE AND FACTS MATERIAL TO CONSIDERATION OF QUESTION NUMBER THREE:

This petition addresses the implied promise within the constitution conferring rights specific to totally disabled veterans; the refusal of Congress to deny

those rights under the Civil Rights Act of 1964, as amended; and the judicial abuse of the right to due process in the recognition and protection of constitutional rights specific to totally disabled veterans.

Federal jurisdiction (Title 28 U.S.C. section 1331) over the subject matter of this complaint (App. A at 37, 72, App. B at 19-20, 29, 41, App. C at 3-4) arose under the Federal Constitution (Article 1. section 8, cl. 11, 12, 18), and the Fifth Amendment to the Constitution in concert with section 712 of the Civil Rights Act of 1964 (P.L. 88-352, Title 42 U.S.C. section 2000e-11).

Question number one was initially presented by petitioner (hereafter Blough) in th ecourse of a district court hearing (App. A at 72, App. B-10, 13, 19-20) in the prior litigation; in the motion to amend the complaint in the prior litigation (App. B-29, 40); in response to respondent's (hereafter Government's) motion for summary judgment in the prior litigation (App. B-50); in the brief/ reply brief/petition for rehearing en banc of the appeal in the prior litigation (App. B at 80-155); in the complaint as filed with the district court in the current litigation (App. C-1); in response to Government's motion for summary judgment in the current litigation (App. C-14); and in the brief/reply brief/petition for en banc consideration in the current appeal (App. C at 50-156). The Government, the district court and the appellate court did not address question number one in the prior or current litigation (App. A-1, 9, 14, 20, App. B-6, 33).

Question number two was initially presented by Blough in the course of a district court hearing (App. A at 56) in the prior litigation; in the motion to amend the complaint in the prior litigation (App. B-29, 40); in the brief /reply brief/petition for rehearing en banc of

the appeal in the prior litigation (App. B at 80-155); in response to Government's motion for summary judgment in the current litigation (App. C-14); and in the brief/reply brief/petition for en banc consideration in the current appeal (App. C at 50-156). The district court and the appellate court did not address question number two in the current or prior litigation (App. A-1, 9, 14, 20). Government relies, in its motion for summary judgment, upon this Court's determination that section 717 of Title VII of the Civil Rights Act of 1964, as amended, provides the exclusive judicial remedy for claims of discrimination in federal employment, *Brown v. General Services Administration*, 425 U.S. 830 (1976), and therefore; Blough has no legal basis to complain of violations under the Fifth Amendment to the United States Constitution. The Government did also claim the limitations of *Brown v. General Services Administration*, supra, in Government's motion (App. B-33) in opposition to Blough's motion to amend the prior complaint to include a claim of constitutional tort (App. B-29).

The district court and the appellate court have, on five occasions prior to this appeal (App. A-1, 9, 14, 20, App. B-6), abstained from addressing Blough's complaint of constitutional tort and the Government's response (App. A-37 App. B-6, 29, 33, 40, 50, App. C-1). This complaint now revolves around questions of law and the conduct of the lower courts as opposed to the facts reflecting upon the violations of Blough's Fifth Amendment liberty interest by the Government. "Unfortunately, this 'is another instance of judicial haste which in the long run makes waste.'" *Estelle v. Gamble*, 429 U.S. 97, 113 (1976) (citing *Dioguardi v. Durning*, 139 F.2d 774 (C.A.2, 1944)).

The prior complaint as filed with the district court on June 29, 1998 did encompass a claim of civil rights

violations under Title VII of the Civil Rights Act of 1964, as amended (App. A-36). The prior complaint did reference Blough's physical disabilities and veterans status, threats of physical injury and retaliation, and the informal response/formal acceptance of said threats by the Government (Department of the Treasury and the Equal Employment Opportunity Commission). The same acts providing basis for claim of constitutional tort.

The claim to violation of a protected Fifth Amendment liberty interest was initially asserted before the district court in the presence of Government's counsel at an early stage of the prior proceedings and was recognized by the district court as the "underlying claim" (App. B at 10, 13, 19-20) based upon Blough's submission of February 16, 1999 (App. A at 72) which was filed and accepted by the court and Government.

Government's motion for summary judgment in the prior litigation was to be taken under submission by the district court on September 10, 1999. Briefs and affidavits of the parties were to be filed by said date. A motion to amend the initial complaint (App. B-29) under Rule 15(a) of the Federal Rules of Civil Procedure was filed with the district court one month prior to the date on which all briefs were required to be filed. The Government did respond to the court in opposition to said motion (App. B-33). The following notification was provided to the defendant (Government) within plaintiff's (Blough) motion to amend in the prior litigation (App. B-29):

> "Plaintiff respectfully requests that the Court grant this request to amend the initial Complaint to include a claim of action against Defendant for deprivation of a fundamental and protected liberty interest which exists within the Fifth

Amendment to the United States Constitution. Jurisdiction is conferred on the Court by 28 U.S.C. section 1331 in that the basis for this amended claim arises under the Federal Constitution.

Title VII of the Civil Rights Act of 1964 is not the exclusive remedy for Plaintiff in that Section 712 of the Act provides that 'nothing contained in this title shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans'. Under the analysis presented by the United States Supreme Court in Washington v. Glucksberg, 117 S. Ct. 2258 (1997); a one hundred percent (100%) physically disabled veteran has a fundamental constitutional right not to be threatened, harassed and retaliated against by the same government which put him in harms way in VietNam.

The essence of Plaintiff's initial complaint under Title VII is that he has been subject to a continuing series of threats, harassment, intimidation and retaliation as a pretext for adverse action over an eight year period. Said actions are also the basis in this Fifth Amendment claim."

Prior to September 10, 1999 the district court was in possession of Blough's motion to amend the prior complaint, memorandum of law in support of motion to amend the complaint, and the Government's motion in opposition to the motion to amend the complaint to include a claim of constitutional tort against Government (App. B-29, 33, 40).

"A complaint must contain, *inter alia*, ' a short and plain statement of the claim showing that the pleader

is entitled to relief.'" *Baldwin County Welcome Center v. Brown*, 446 U.S. 151 (1984) citing Fed. Rule Civ. Proc. 8(a)(2).

> "Although the Federal Rules of Civil Procedure do not require a claimant to set forth an intricately detailed description of the asserted basis for relief, they do require that the pleadings 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" *Conley v. Gibson*, 355 U.S. 41, 47 (1957).

The notification (App. B-29, 40, 47) provided to defendant (Government) in the prior litigation not only met, but exceeded the requirements of *Baldwin County Welcome Center*, supra, and *Conley v. Gibson*, supra. The defendant was apprised of the substance of the allegation and the grounds upon which it rests. The actions describing when, how, to whom, and with what results were spelled out in great detail within the prior complaint (App. A-36) and were "also the basis of this Fifth Amendment claim".

The following statement is presented within the initial paragraph of the Order of the district court (App. A at 20):

> "This cause comes before the Court on defendant's Motion for Summary Judgment (Doc. No. 75). Plaintiff has filed a response in opposition (Doc. No. 107)."

The following statements were presented within Blough's response (Doc. No. 107) (App. B at 51, 77-78) to Government's motion for summary judgment.

> "Two motions are pending before the Court to amend the initial Complaint of employment related discrimination under Title VII of the Civil

Rights Act of 1964. The facts presented in this Complaint are so egregious such as to violate multiple statutes and the Constitution itself. It would be inappropriate for the Court to consider this motion for summary judgment which is limited to a single claim within a multi-facet Complaint.

Upon completion of the amending process the Complaint will incorporate the following courses of action (claims) which utilize three different routes to reach the ultimate conclusion of discrimination. The facts are consistent with each route; however the law and remedies differ.

1. Deprivation of a fundamental and protected liberty interest which exists within the Fifth Amendment to the United States Constitution."

The following statement is also presented within the initial paragraph of the Order of the district court (App. A at 20):

> "Plaintiff has also filed various papers which appear to be addressed to his Motion to Amend Complaint and/or his response to defendant's Motion for Summary Judgment. See Doc. 104 and 105."

Document 104 (App. B-40) is a five page memorandum of law in support of Blough's motion the amend the initial complaint to include a claim of constitutional tort against the Government (App. B-29) and was filed in response to the Government's motion in opposition to Blough's motion to so amend (App. B-33). In referencing document 104 within the Order, the district court judicially involved Blough's claim of constitutional tort (App. A-37, App. B-29, 33, 40).

The district court did concurrently grant Government's motion for summary judgment in the prior complaints of Civil Rights and Rehabilitation Act violations (App. A at 26); however did abuse its authority in that the court abstained from adjudication of Blough's motion to amend the initial complaint to include a claim of constitutional tort by Government (App. B-29, 40). The claim of constitutional rights violations which were put in issue by the district court as the "underlying claim" (App. B at 10) and in the amended complaint (App. B-29, 33, 40) were involved; however not adjudicated by the Order of the district court (App. A at 26). The Order of the district court granting Government's motion for summary judgment (App. A at 26) did summarily render all pending motions moot; including the motions to amend the initial complaint to include a claim of constitutional tort against Government (App. B-29, 40).

Blough's response (App. B-50) to Government's motion for summary judgment provides confirmation of the district court's failure to consider Blough's pleadings. The Order by the district court in the prior litigation (App. A-20) misrepresents the pleadings of both parties, creates an absurd scenario and then ridicules Blough for proposing the scenario.

Blough did appeal the prior decision of the district court (App. A-20) to the appellate court (case no. 99-13735-FF) in that the motions (App. B-29, 40) to amend the initial Complaint (App. A-36) to include a claim of constitutional tort by Government were raised and involved; however were not adjudicated by the Order of the district court (App. A-20). Copies of Blough's pleadings to the Eleventh Circuit are located within appendix B (App. B at 80-155) and did include those motions to amend the prior complaint (App. B-29, 33, 40). The appellate court affirmed by

abstention the failure of the lower court to adjudicate the claim of constitutional tort which was argued by Blough in his Brief ; Reply Brief ; and Petition for Rehearing En Banc (App. B at 80-155).

Blough did not seek review by this Court of the prior decisions of the district court (App. A-20) and appellate court (App. A-14). The finality of the decisions was limited to the cause of action under Title VII of the Civil Rights Act of 1964 and the Rehabilitation Act of 1973. The current claim of constitutional tort (cause of action), which is without finality, continues to be worthy of this Court's attention as a question of national import.

Blough returned to the district court and filed the current lawsuit (App. C-1) alleging those constitutional rights violations which were raised in the prior litigation (App. A-36, App. B-6, 29, 40, 50, App. C-14). The Complaint of August 8, 2000 (App. C-1) references the prior litigation and the failure of the Order of the district court (App. A-20) to adjudicate the merits of the complaint of constitutional tort (App. B-29, 33, 40) under the 'constitutional standards' required by this Court in *Washington v. Davis*, 426 U.S. 229, 240, 248, (1976). Government's motion for summary judgment in the current litigation did not reference Blough's motion to amend the prior complaint to include a claim of constitutional tort (App. B-29, 40) nor the Government's response to Blough's motion to so amend (App. B-33); all of which were documented with the court (App. C at 47-49) in Blough's response to Government's motion for summary judgment. The district court did again abstain from adjudicating Blough's complaint of constitutional tort and granted Government's motion for summary judgment based upon the doctrine of *res judicata* (App. A at 11-12).

Blough did appeal the current decision of the district court (App. A-9) to the appellate court (case no. 00-16546-F)(App. C at 50-156). The appellate court summarily affirmed the Order of the district court (App. A at 3) based upon the doctrine of res judicata as adjudicated "in the Eleventh Circuit", *Ragsdale v. Rubbermaid*, 193 F.3d 1235, 1239 (11th Cir. 1999), and did again affirm the district courts abstention by declaring as moot questions number one and two as presented to this Court (App. A at 3).

REASONS FOR GRANTING THE PETITION

This appeal warrants acceptance and consideration in matters of federal law and national import as to which the Supreme Court has final jurisdiction based upon the following considerations:

1. **The recognition of a constitutional obligation conferring inherent constitutional rights which are "so rooted in the traditions and conscience of our people as to be ranked as fundamental". *Palko v. State of Connecticut, 302* U.S. 319 (1937).**

   "Statutory rights and obligations are established by Congress ..... The Constitution, on the other hand, does not 'partake of the prolixity of a legal code' *McCulloch v. Maryland*, 17 U.S. 316 (1819). It speaks instead with a majestic simplicity. One of 'its important objects,' *ibid.*, is the designation of rights. And in 'its great outlines,' *ibid.*, the judiciary is clearly discernible as the primary means through which these rights may be enforced." *Davis v. Passman*, 442 U.S. 228, 242 (1979).

The object of the Constitution was to establish the departments of government and define its powers in

general terms in order that "We, the people of the United States" may (among other stated purposes) "secure the blessings of liberty to ourselves and our posterity". To that purpose "Congress shall have the power to declare war".

> "'A great mass of human transactions depend upon implied contracts which are not written, but grow out of the acts of the parties. In such cases the parties are supposed to have made those stipulations which, as honest, fair and just men, they ought to have made'. There can be no more comprehensive definition of an implied contract. It applies to governments as well as individuals, and determines the liabilities of each, with the same regard to justice and reason." *United States v. Russell*, supra. (citing *Chief Justice Marshall, Gibbons v. Ogden*, 12 Wheat., 341).

> "*Indebitatus assumpsit* is founded upon what the laws term an implied promise on the part of the defendant to pay what, in good conscience, he is bound to pay to the plaintiff, but the law will not imply a promise to pay unless some duty creates such an obligation". *United States v. Russell*, supra.

No continuing relation between the Federal Government and a citizen is more distinctively federal in character than that between it and the totally disabled veteran. The scope, nature, implied contracts and reciprocal obligations of the relation are derived from the constitution, are governed by federal authority, and have been the subject of Congressional recognition since the inception of the Republic. The Federal Government has the exclusive power to establish and define the relation by virtue of its military and other powers (including the powers of

Congress to 'provide for the common Defence,' 'To declare War,' 'raise and support Armies,' and 'make all laws which shall be necessary and proper for carrying into execution the foregoing powers,' U.S. Const., Art. I, section 8).

While jurisdiction of this Court over the relation between the Federal Government and the totally disabled veteran is not conferred by the constitution in express words, it is inherent in the authority and purpose of this Court to safeguard constitutional rights and public interests. This Court, as an agency of the Federal Government is an "instrument for realizing a public purpose", *Scripps-Howard Radio v. Fed. Communications Com'n*, 316 U.S. 4 (1942), of Constitutional stature.

A constitutional right is fundamental if it is "preservative of all rights". *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). The United States Government /Department of the Treasury and the respective Federal courts have violated and denied a constitutional obligation of "We, the people of the United States" to a totally disabled veteran. Inherent to status as a totally disabled veteran is a fundamental right to due process in the protection of Fifth Amendment liberty interests under the United States Constitution.

Beginning with our Nation's struggle for freedom two centuries ago, approximately 42 million men and women served their country during wartime periods. As of September 30, 1998; 2.3 million veterans were recognized by the United States Department of Veterans Affairs as veterans with service connected disabilities (of which one hundred sixty-one thousand three hundred sixty (161,360) were recognized as totally disabled (100%) (source: Department of Veterans Affairs FY 1998 Annual Report). As of

September 30, 1998; 1.8 million veterans were employed by the Federal Government. (source: Human Resources Division/Office of Personnel Management). The determination by the Federal Government as to status as a totally disabled veteran is provided under P.L. 85-857, Title 38 U.S.C., Part II, Chapter 11, Subchapter II, sections 1110, 1114(j).

Based upon the standards established by this Court in *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997), totally disabled veterans have a fundamental and constitutionally protected liberty interest which prohibits continuous acts of employment related threats of physical injury, discrimination and retaliation by the same government which put them in harms way.

The violations of Blough's constitutional rights by Government were invidious in nature and so unjustifiable as to be violative of due process under *Bolling v. Sharpe*, 347 U.S. 497 (1954) and subject to challenge under *Washington v. Davis*, supra..

The abusive managerial environment within the United States Department of the Treasury did violate Blough's inherent Fifth Amendment right to be free from unjustified intrusions on personal security as provided in *Ingraham v. Wright*, 430 U.S. 651, 673 (1977). The continuing threats of physical injury, the Government's written response (Internal Revenue Service and Equal Employment Opportunity Commission) that said threats were not carried out and therefore no process was due Blough, the continuing harassment and retaliation over a nine year period were all supported by extensive documentation and third-party testimony obtained during the discovery phase of the prior complaint and were presented to the respective court (App. A-43, App. B-50). Based upon the federal employment

incentives extended to disabled veterans by Congress and the constitutional obligation to totally disabled veterans, Blough's objective expectation of the "right to be free from and obtain judicial relief from unjustified intrusions on personal security" was justified and did rise to the level of a constitutionally protected liberty interest as presented in *Vitek v. Jones*, 445 U.S. 480, 493.

Blough suggests to the Court that the analytical structure under which this claim of constitutional tort should be addressed is presented in *Siegert v. Gilley*, 500 U.S. 226, 233 (1991), as opposed to *Harris v. McRae*, 448 U.S. 297, 308 (1980). The adjudication of the constitutional right presented as question number one is determinative of the special *right* of exception under the statute (Title VII section 712 of the Civil Rights Act of 1964) presented as question number two. In addition; the adequacy of due process presented as question number three is also dependant upon the adjudication of the constitutional right presented. When due process clause is invoked in novel context, court must begin inquiry with determination of precise nature of private interest that is threatened, and only after that interest has been identified, can court properly evaluate adequacy of process. *Lehr v. Robertson*, 463 U.S. 248 (1983).

> "Such a cause of action (constitutional violation) may be defeated in a particular case, however, in two situations. The first is when defendants demonstrate 'special factors counseling hesitation in the absence of affirmative action by Congress.' The second is when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective." *Carlson v. Green*, 446 U.S. 14 (1980).

The cause of action presented as question number one was not an adverse action covered by the statutory scheme of the Civil Service Reform Act under Title 5 U.S.C. section 7512 and is therefore not a special factor counseling hesitation under the initial standard of *Carlson v. Green,* supra. In addition; Congress has taken affirmative action in the provision of federal district court review for a federal employee under the Civil Service Reform Act via Title 5 U.S.C. section 7703(b)(2), which provides that cases of discrimination subject to the provisions of Title 5 U.S.C. section 7702 shall be filed under the judicial review provisions of Title VII of the Civil Rights Act of 1964. Upon completion of the required period for administrative review Title 5 U.S.C. section 7702(e) (1) (c) and Title 42 U.S.C. section 2000e-16(c), Blough did initiate a Title VII action in the district court (App. A-36).

The threats of physical injury to a totally disabled veteran and the subsequent harassing and retaliatory actions of the Government employer may be addressed under Title VII of the Civil Rights Act of 1964 and the constitution as discussed in item number two below; thereby negating the second standard of *Carlson v. Green,* supra.

2. **The conflict between this Court's implied restriction in *Brown v. General Services Administration*, supra, and the explicit exception provided by Congress under section 712 Title VII of the Civil Rights Act of 1964, as amended. This conflict in law mandates adjudication by this Court and the concurrent constitutional question is unavoidable to resolution.**

The blanket restriction by this Court in *Brown v. General Services Administration*, supra, is subject to

modification based upon the Congressional exception of Title VII section 712 of the Civil Rights Act of 1964, as amended and the inherent constitutional right asserted in question number one.

> "The primary question in this litigation is not difficult to state: Is section 717 of the Civil Rights Act of 1964, as added by section 11 of the Equal Employment Opportunity Act of 1972, 42 U.S.C. section 2000e-16 the exclusive individual remedy available to a federal employee complaining of job-related discrimination ? But the question is easier to state than it is to resolve. Congress simply failed explicitly to describe section 717's position in the constellation of antidiscrimination law. We must, therefor, infer congressional intent in less obvious ways." Brown v. General Services Administration, supra, at 824.

> "In the case at bar, as in *Preiser* and the other cases cited above, the established principal leads unerringly to the conclusion that section 717 of the Civil Rights Act of 1964, as amended, provides the exclusive judicial remedy for claims of discrimination in federal employment." Brown v. General Services Administration, supra at 836.

Section 712 of Title VII of the Civil Rights Act of 1964, as originally passed by Congress, does provide an important exception to the judicial restrictions of section 717 as recognized by the Supreme Court in Brown v. General Services Administration, supra. Reliance by the Government on *Brown v. General Services Administration* is misplaced based upon the express provision of Congress under section 712 of Title VII of the Civil Rights Act of 1964 that "nothing contained in this title shall be construed to repeal or modify any Federal ..... law creating special rights ...

for veterans" and the findings by the United States Supreme Court that discrimination by the United States Government may be so unfair as to violate Fifth Amendment rights. Blough did make this argument in his motion to amend the prior complaint to include a claim of constitutional tort (App. B-29); in the prior appeal to the appellate court (App. B at 80-155); in response to Government's current motion for summary judgment (App. C-14); and in the current appeal to the court of appeals (App. C at 50-156).

The proceedings and debates of the 88th Congress relative to the Civil Rights Act of 1964 appear within the Congressional Record as S.1732 and H.R. 7152 (Public Law 88-352-July 2, 1964). Title VII was a very controversial portion of the Act; however there was no debate on section 712. The only difference in the exception provided within section 713 of the initial Senate and House bills (section 712 of the final bill) was directed to the special rights for veterans and did not include the additional reference to preference for veterans which was incorporated in the final bill which became law. Congress did by legislative process and statute distinguish veterans rights from veterans preferences.

Federal employment discrimination clearly violated the Constitution before the passage of the 1972 Act. *Brown v. General Services Administration*, supra , at 824 (citing *Bolling v. Sharpe*, supra). Section 712 of Title VII did originate under the 1964 Civil Rights Act which "manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes". *Brown v. General Services Administration*, supra at 832 (citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48 (1974).

"As we have had occasion recently to repeat, 'repeals by implication are disfavored,' and this canon of construction applies with particular force when the asserted repealer would remove a remedy otherwise available." *Schlesinger v. Councilman*, 420 U.S. 738, 752 (1975).

Section 717 of Title VII of the 1964 Civil Rights Act, as amended, leaves undisturbed whatever remedies Blough might otherwise possess. As in the case of *Brooks v. United States*, 337 U.S. 49 (1949), it would be absurd to believe congress did not have the constitutional rights of veterans in mind when they passed section 712 Title VII of the Civil Rights Act of 1964. Blough is permitted to pursue his rights under both Title VII of the Civil Rights Act of 1964, as amended, and any other law creating a right as a totally disabled veteran.

The Federal preference under section 712 Title VII of the Civil Rights Act of 1964 is based upon the Veterans' Preference Act of 1944. Preferences are clearly defined; however the rights of veterans are not defined; although guaranteed in both Acts. Here, the rights and preferences provided to veterans by Congress are reasonably and directly related to a legitimate, nondiscriminatory obligation of the constitution.

"We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" " *Connecticut v. Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992). The plain language of section 712 reflects upon a Congressional intent to ensure that Title VII does not disenfranchise veterans of other rights and preferences which they possess.

The plenary power of Congress to protect the totally disabled veterans is drawn implicitly from the inherent fundamental liberty interest of said veterans under Article 1, section 8, cl. 11, 12, 18 of the Constitution and the Fifth Amendment to the Constitution. The constitutional obligation to totally disabled veterans is of constitutional stature. It would be irrational to believe that Congress passed legislation in 1972 (i.e. section 717 of Title VII of the Civil Rights Act of 1964) which permitted the United States Government to violate the constitutional rights of totally disabled veterans in the employ of the United States Government.

Section 712 of Title VII of the Civil Rights Act of 1964 provides that section 717 is not the exclusive remedy for a veteran who in this case has been recognized by the United States Government as service connected in a state of total disability. The fact said veteran is an employee of the United States Government cannot deprive him of his constitutional rights.

The section 717 Title VII restriction on remedy was inferred by the United States Supreme Court in *Brown v. General Service Administration*, supra; however the language of section 712 Title VII is explicit and has remained unchanged since Congressional enactment.

Generally, statutory classifications are valid if they bear a rational relationship to a legitimate governmental purpose. Statutes are subject to a higher level of scrutiny if they interfere with the exercise of a fundamental right .....*Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 547 (1983).

Section 717 of Title VII of the Civil Rights Act of 1964, as amended, is not unconstitutional in that

Congress did provide protection to the fundamental constitutional rights of totally disabled veterans via section 712 of the respective Act.

The statutory exclusion provision of section 712 of Title VII of the Civil Rights Act of 1964, as amended, is compatible with the restrictions of section 717 of said Act. It is the blanket exclusive remedy of section 717 of the Act as inferred by the United States Supreme Court in *Brown v. General Services Administration*, supra, which is challenged based upon facts specific to this case. The constitutional right asserted in question number one must be recognized to challenge as a special right under Title VII section 712 of the Civil Rights Act of 1964, as amended, providing exception to the Supreme Courts inferred restriction in *Brown v. General Services Administration*, supra. This is a case of first impression in addressing the exception of section 712 Title VII of the Civil Rights Act of 1964.

3. **The judicial abuse by the lower courts in denying a constitutional obligation to due process.**

The current judgment under appeal (App. A at 1-8) contains the following conclusions which reflect an abuse of judicial authority:

A. "He (Blough) argues that, in the 1998 case, the district court violated his due process rights by summarily denying his motion to amend his complaint to add his Fifth Amendment claims and that this Court violated his due process rights by affirming the district court."

"We do not address Blough's contention that he was denied due process by the district court and this Court in his 1998 case, the 1998 case is not

properly before this Court."

RESPONSE

The refusal of the appellate court to address Blough's contention in the current litigation that he was denied due process in his complaint of constitutional tort in the prior litigation is fatal to the appellate court's finding of res judicata . As this Court noted in *Collins v. Miller*, 252 U.S. 364 (1920), the prior litigation must be reviewed to address the question of 'finality' presented by Blough in the current litigation. The purpose in Rule 15(a) of the Federal Rules of Civil Procedure is to afford the injured party a full and fair opportunity to be heard.

> "Finality,' for purposes of the application of Rule 54(b), is generally understood as that degree of finality required to meet the appealability requirements of 28 U.S.C. section 1291. *Sears, Roebuck & Co. v. Mackey,* 351 U.S. 427 (1956). Where a judgment is not 'final', within the terms of 28 U.S.C. section 1291, and hence not certifiable under Rule 54(b), it has no *res judicata* effect. In the words of the Supreme Court: ..... it is familiar law that only a final judgment is *res judicata* as between the parties". *G. & C. Merriam Co. v. Saalfield and Ogilvie*, 241 U.S. 22, 28 (1916). Acha v. Beame, 570 F.2d 57 (2nd Cir. 1978).

The Orders of the district court in the prior and current litigation (App. A-9, 20) are not "final" under Rule 54(b) with regard to the claim of constitutional tort (App. A at 37, App. B-6, 29, 33, 40, 50, App. C-1) which was raised and involved in the prior and current litigation; however was neither adjudicated by the district court nor addressed by the appellate court (App. A-1, 9, 14, 20). The Orders of the district court

(App. A-9, 20) are not certifiable as a "final" decisions subject to the jurisdiction of the appellate court 28 U.S.C. section 1291 with respect to the claim of constitutional tort. The affirmation of abstention by the appellate courts in the current and prior litigation was an abuse of authority in that the respective courts were without jurisdiction with regard to the claim of constitutional tort. The claim of constitutional tort in the prior (App. A at 37, 72, App. B at 19-20, 29, 33, 40, 77-78) and current litigation (App. C-1) is neither "final" under Rule 54(b) of the Federal Rules of Civil Procedure nor "moot" under *Murphy v. Hunt*, 455 U.S. 478, 482 (1982).

The court record clearly reflects the fact that the lower courts did abstain from consideration of the pleadings as presented by Blough. The actions of the lower courts were in fact a pretense of due process, *Palko v. State of Connecticut*, 302 U.S. 319 (1937), constituting an intentional abuse of judicial authority such as to call for an exercise in the supervisory power of the United States Supreme Court. The judicial abstention by the lower courts exceeds the discretionary standards for review by this Court under Rules 10(a) and 10(c).

B. "The district court correctly granted summary judgment to the defendants, based upon res judicata, because; (3) his 1998 case was decided against him by a final order on the merits by a court of competent jurisdiction. Blough's claim that the application of res judicata denies him due process has no merit, because he had notice and an opportunity to be heard in the 1998 case."

RESPONSE

The Order of the district court (App. A-9) states that Blough failed to plead his Fifth Amendment claim in the prior litigation; however the respective court chose to ignore the following facts as presented by Blough:

> The claim of constitutional tort was raised and admitted into the court record as the "underlying claim" during the hearing of February 26, 1999 (App. B at 10, 13, 19-20); raised by the motion to amend which was properly filed with the court and involved in the prior complaint (App. B-29, 33, 40); referenced in the motion to amend the prior complaint to include a claim under Rehabilitation Act of 1973 (App. B-38, 47); and referenced in Blough's response to Government's motion for summary judgment (App. B-50).
>
> The Order by the district court (App. A at 26) was limited to the alleged violations under Title VII of the Civil Rights Act of 1964, as amended, (App. A -36) and the motion to amend the prior complaint to include violations under the Rehabilitation Act of 1973 (App. B-21, 25, 47). The prior Order by the district court was therefore flawed on its face, in that the initial paragraph involves a document (App. B-40) filed in support of the motion to amend for claim of constitutional tort (App. B-29) and in response to Government's motion in opposition to said motion (App. B-33); however the Order by the district court failed to adjudicate the motion to amend for the claim of constitutional tort (App. B-29, 40). The claim of constitutional tort was not subsumed in the claim of civil rights violations based upon the restriction of *Brown v. General Services Administration,* supra. due to the exception

provided under section 712 Title VII of the Civil Rights Act of 1964 and the differing legal standards referenced in *Washingtin v. Davis*, supra. No "final order" has been issued "on the merits" of Blough's the claim of constitutional tort.

The decisions in *Montana v. United States*, 440 U.S. 147 (1979) and *Ragsdale v. Rubbermaid, Inc.*, supra, were based upon the premise, before any other considerations, that the relevant party has "had a full and fair opportunity to litigate". This Court has repeatedly recognized the absolute necessity that the party against whom the earlier decision is asserted must have been afforded a full and fair opportunity to litigate that issue in the earlier case. *Allen v. McCurry*, 449 U.S. 90, 96 (1980). The *opportunity* to be heard is a fundamental requirement of procedural due process. *Boddie v. Connecticut*, 401 U.S. 371 (1971). Blough was denied a full and fair opportunity to litigate in the earlier case and therefore the doctrine of res judicata does not apply to the current litigation (App. A-1, A-9). Redetermination of issues is warranted if there is reason to doubt the fairness of procedures followed in prior litigation, *Montana*, supra. at 165.

C. "The district court correctly granted summary judgment to the defendants, based upon res judicata, because (1) Blough's Fifth Amendment claims in this case involved the same nucleus of operative fact as the claims in his 1998 case and were brought, or could have been brought, either in his 1998 case's original complaint or by amendment by right to the 1998 complaint."

RESPONSE

The Eleventh Circuit has taken the legal position that the facts constitute the cause of action and are therefore the means to an end for purposes of res

judicata. *Ragsdale v. Rubbermaid, Inc.*, 193 F.3d 1235, 1239 (11th Cir. 1999). This position is in conflict with the analysis presented by this Court in *Baltimore S. S. CO. et al v. Phillips*, 274 U.S. 316 (1927).

> "Res judicata depends upon whether the second action or suit is upon the same or a different cause of action. 'A party seeking to enforce a claim, legal or equitable, must present to the court, either by the pleadings or proofs, or both, all the grounds upon which he expects a judgment in his favor', *Stark v. Starr*, 94 U.S. 477. A cause of action does not consist of facts, but the unlawful violation of a right which the facts show. The facts are merely the means, and not the end. They do not constitute the cause of action, but they show its existence by making the wrong appear. The *thing*, therefore, which in contemplation of law as its *cause*, becomes a ground for action, is not the group of *facts* alleged in the declaration, bill, or indictment, *but the result of these in a legal wrong, the existence of which, if true, they conclusively evince.'"* *Baltimore S. S. Co. et al. v. Phillips*, 274 U.S. 316 (1927) (citing *Chobanian v. Washburn Wire Co.*, 33 R. I. 289, 302, 80A. 394, 400).

> "In the Eleventh Circuit, '[t]he principal test for determining whether the causes of action are the same is whether the primary right and duty are the same in each case. In determining whether the causes of action are the same, a court must compare the substance of the actions, not their form.' *Citibank*, 904 F.2d at 1503 (citations omitted). "It is now said, in general, that if a case arises out of the same nucleus of operative facts, or is based upon the same factual predicate, as the former action, that the two cases are really

the same 'claim' or 'cause of action' for purposes of res judicata." *Id.* Ragsdale v. Rubbermaid, Inc., supra.

Title VII was enacted pursuant to the commerce clause of the constitution and was not intended to incorporate and particularize the commands of the Fifth Amendment. *United Steelworkers, Etc. v. Weber*, 443 U.S. 193, 208, (1979). The cause of action adjudicated in the prior litigation (discrimination under Title VII sections 704 and 717 of the Civil Rights Act of 1964, as amended; and the Rehabilitation Act of 1973) is not the same cause of action raised by amendment in the prior litigation and asserted in the current litigation (violation of Blough's constitutional rights under the Fifth Amendment).

In the case at point, the cause of action under Title VII/Rehab Act of 1973 and the cause of action under the constitution did involve the same parties and are based upon the same nucleus of operative facts. The same factor (i.e. threats of physical injury) provides two legal wrongs (causes of action) under the analysis of *Baltimore S. S. CO. et al v. Phillips,* supra; each with differing legal standards of review as required in *Washington v. Davis*, supra, at 248. Employment related threats are also cognizable under Title VII, *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). Both causes of action were raised by Blough in the prior litigation; however the decisions by the district court and the appellate court were limited to the cause of action (legal wrong) under Title VII of the Civil Rights Act of 1964, as amended, and the Rehabilitation Act of 1973 (App. A at 8, 24).

Blough has been denied due process in the judicial abstention to litigation of a specific legal right, (questions number one and two as presented to this Court), which is distinct from the legal right

adjudicated by the lower courts. Blough was therefore free to initiate the current action based upon the same nucleus of operative facts without res adjudicata effect.

CONCLUSION

The "national debt" is not measured in dollars, but rather in the number of lives lost and lives crippled in service to America by its veterans. With the exception of the memorial obligation to those who lost their lives in service to their country; the American public has no greater debt than to the totally disabled veterans.

In *Arver v. United States,* 245 U.S. 366 (1918) this Court recognized a constitutional obligation compelling military service pursuant to the authority of Congress to declare war. Congress has established an extensive array of statutory rights (Public Law 78-359: Veterans Preference Act of 1944 and Public Law 85-857: Veterans Benefits) in recognition of the reciprocal obligation to veterans.

The exercise of the war powers is subject to the guarantees of the Fifth Amendment. *Hamilton v. Kentucky Distillers & Warehouse Co.*, 251 U.S. 146 (1919)(citing *United States v. Russell*, S.C.,13 Wall. 623, 627). The exercise of war powers by the Federal Government did impose substantial pain and sacrifice upon the lives and liberties of totally disabled veterans which remains with them for the remainder of their lives; as does the special relation to the Federal Government and the debt of the American public. The guarantees of the Fifth Amendment attach to the continuing liability for those sacrifices which cannot be made whole and provide recourse to the totally disabled veteran for additional injuries which sicken the heart, soul and conscious of America.

This Court is called upon to recognize an implied promise (obligation) of the constitution conferring rights specific to the status of totally disabled veterans. The implied promise (obligation) exists within the constitution and was created by the exercise of powers specific to the constitution. This Court is also called upon to recognize specific Fifth Amendment rights inherent to status of America's one hundred sixty thousand totally disabled veterans. They have an unrestricted constitutional right which prohibits employment related threats of physical injury, discrimination and retaliation by the same Government which put them in harms way under the provisions of the constitution. They also have a constitutional right not to be subject to the abuse of judicial authority by the Federal courts.

Recognition of the constitutional obligation conferring rights specific to totally disabled veterans is presented as questions number one and three. As this Court recognized the constitutional obligation (implied promise) to Fifth Amendment rights in *United States v. Russell*, supra.; so may this Court in the case of totally disabled veterans, in that the rights are provided for within the exception of section 712 to Title VII of the Civil Rights Act of 1964, as amended; and the obligation within the Constitution.

The judgment under appeal (App. A at 1-8) contains the following disclaimer:

> "We do not address Blough's arguments regarding whether Title VII of the Civil Rights Act provides the exclusive remedy for disabled veterans with claims of discrimination in federal employment or whether the Fifth Amendment provided Blough a remedy, because those issues are moot in light of the fact the district court correctly granted summary judgment to the

defendants on res judicata grounds."

Questions number one and two provide a case in controversy to which the United States is a party under Article 3, section 2, cl. 1 of the Constitution.

Questions number one and two are questions of law which were presented to the lower courts without response. Grounds not passed on by court of appeals but argued in Supreme Court orally and in the briefs would be considered by Supreme Court granting certiorari, where such grounds raised only issues of law not calling for examination or appraisal of evidence. *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951). The following facts; which were documented by Blough in the current litigation and admitted by Government in the prior litigation ; are judicially complete such as to warrant a decision on the questions of law presented:

A) Blough is a combat disabled veteran recognized as totally disabled by the Department of Veterans Affairs. Blough has two artificial legs and loss of use of one hand as a result of service in Vietnam (App. B-1).

B) Blough has been employed by Government since 1979 as an Internal Revenue Agent (App. B-3).

If this Courts remands without a decision as to questions number one and two, the Government will again move for summary judgment based upon this Courts decision in *Brown v. General Services Administration*, supra. The inferred judicial limitation of section 717 as stated by the Supreme Court in *Brown v. General Services Administration,* supra, is subject to modification by this Court alone. Section 712 of Title VII was not referenced in *Brown v. General Services Administration*, supra, and therefore was not

a fact in consideration by this Court. All Federal circuits have ruled that Fifth Amendment claims are precluded because Title VII is the exclusive remedy for federal employees based upon *Brown v. General Services Administration*, supra; however no court has considered the section 712 exception as presented.

A final judgment on the merits of Blough's complaint of constitutional tort (questions number one and two), which was raised and involved in the prior litigation, has not been rendered by a court of competent jurisdiction as required by *Southern Pacific R. Co. v. United States*, 168 U.S. 1 (1897) and therefore has no res judicata effect upon the current litigation. *Sears, Roebuck & Co. v. Mackey*, supra; *G. & C. Merriam Co. v. Saalfield and Ogilivie*, supra.

WHEREFORE, Blough respectfully requests that this Court remand this case to the lower courts with proper instruction and positive resolution to these questions of law which are of national significance in addressing the constitutional obligation to protect the inherent Fifth Amendment rights of totally disabled veterans.

Respectfully submitted.

Melvin E. Blough pro se

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(813) 651-3158

APPENDIX

TO THE PETITION FOR WRIT OF CERTIORARI

No. _____

In The

Supreme Court of the United States

Melvin E. Blough,

Petitioner

v.

United States of America,
United States Department of the Treasury,
Paul H. O'Neill, Secretary of the Treasury,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Volume A

[DO NOT PUBLISH]

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
MAY 22 2001
THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-16546
Non-Argument Calendar

D.C. Docket No. 00-01631-CV-T-26E

MELVIN E. BLOUGH,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,
DEPARTMENT OF TREASURY,
PAUL O'NEILL, Secretary of the Treasury,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Florida

(May 22, 2001)

Before BIRCH, CARNES and Barkett, Circuit Judges.

PER CURIAM:

Melvin E. Blough, proceeding pro se, appeals the district court's grant of summary judgment, based on the doctrine of res judicata, to the defendants in his civil rights action for an alleged violation of his Fifth Amendment rights.

Blough argues that the doctrine of res judicata was wrongly applied because, although his previous 1998 case, upon which res judicata was based, and this case involved the same parties and same nucleus of operative fact, the district court in the 1998 case denied as moot his motion to amend his complaint to add the Fifth Amendment claims of unconstitutional threats, harassment, and retaliation, and thus, he never had an opportunity to litigate those claims. Blough argues that application of the doctrine of res judicata deprived him of due process and reflected disparate treatment because of his pro se status. Blough additionally argues that under the Fifth Amendment he possess an actionable liberty interest in being free from threats of physical injury, discrimination, and retaliation by the United States and that Title VII of the Civil Rights Act, the basis of his 1998 cause of action, does not provide the exclusive remedy, for disabled veterans, for claims of discrimination in federal employment. Finally, he argues that, in the 1998 case, the district court violated his due process rights by summarily denying his motion to amend his complaint to add his Fifth Amendment claims and that this Court violated his due process rights by affirming the district court.

We review de novo a decision barring a claim on the basis of res judicata. See Ragsdale v.Rubbermaid, 193 F.3d 1235, 1237 (11th Cir. 1999), cert. denied, 530 U.S. 1223 (2000).

We have reviewed Blough's complaint, the proceedings in the 1998 case as contained in the record, and all other relevant portions of the record. Having considered these documents together with the parties' briefs, we find no reversible error.

As a preliminary matter, we do not address Blough's contention that he was denied due process by the district court and this Court in his 1998 case, the 1998 case is not properly before this Court. We do not address Blough's arguments regarding whether Title VII of the Civil Rights Act provides the exclusive remedy for disabled veterans with claims of discrimination in federal employment, or whether the Fifth Amendment provided Blough a remedy, because those issues are moot in light of the fact the district court correctly granted summary judgment to the defendants on res judicata grounds.

The district court correctly granted summary judgment to the defendants, based upon res judicata, because (1) Blough's Fifth Amendment claims in this case involve the same nucleus of operative fact as the claims in his 1998 case and were brought, or could have been brought, either in his 1998 case's original complaint or by amendment by right to the 1998 complaint; (2) Blough admitted that this case and the 1998 case involved the same parties or those in privity with them; and, (3) his 1998 case was decided against him by a final order on the merits by a court of competent jurisdiction. Blough's claim that the application of res judicata denies him due propcess has no merit, because he had notice and an opportunity to be heard in the 1998 case. His contention that the doctrine of res judicata has been applied disparately against him as a pro se party also lacks merit; the doctrine would be applied in the same manner to the facts of this case if he were proceeding with counsel.

AFFIRMED.

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
MAY 22 2001
THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-16546

MELVIN E. BLOUGH,

Plaintiff-Appellant,

versus

USA,
DEPARTMENT OF THE TREASURY,
PAUL O'NEILL, Secretary of the Treasury,

Defendants-Appellees.

On Appeal from the United States District Court for the Middle District of Florida

---

BEFORE: BIRCH, CARNES and BARKETT, Circuit Judges.

BY THE COURT:

Appellant's motion to certify certain questions to the United States Supreme Court, which is contained within the Petition for Hearing En Banc, is DENIED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JUN 07 2001
THOMAS K. KAHN
CLERK

No. 00-16546-FF

MELVIN E. BLOUGH,

Plaintiff-Appellant,

versus

USA,
DEPARTMENT OF THE TREASURY,
PAUL O'NEILL, Secretary of
the Treasury,

Defendants-Appellees.

On Petition for Hearing En Banc from the
United States District Court for the
Middle District of Florida

BEFORE: BIRCH, CARNES and BARKETT, Circuit Judges.

No Judge in regular service on the Court having requested that the Court be polled on hearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition for Hearing En Banc is DENIED.

ENTERED FOR THE COURT:

"S/CARNES"
UNITED STATES CIRCUIT JUDGE

United States Court of Appeals

For the Eleventh Circuit

No. 00-16546

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
May 22, 2001
THOMAS K. KAHN
CLERK

District Court Docket No.
00-01631-CV-T-26E

MELVIN E. BLOUGH,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,
DEPARTMENT OF THE TREASURY,
PAUL O'NEILL, Secretary of
the Treasury,

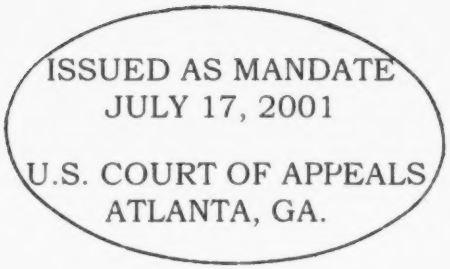
Defendants-Appellees.

Appeal from the United States district Court
for the Middle District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion, included herein by reference, is entered as the judgment of this Court.

Entered: May 22, 2001
For the Court: Thomas K. Kahn, Clerk
By: Meoli, Anthony


ISSUED AS MANDATE
JULY 17, 2001
U.S. COURT OF APPEALS
ATLANTA, GA.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

FILED
00 NOV 21 AM11:59
CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA, FLORIDA

MELVIN E. BLOUGH,

Plaintiff,

v. CASE NO:8:00-cv-1631-T-26E

UNITED STATES OF AMERICA, UNITED STATES DEP'T OF THE TREASURY, LAWRENCE SUMMERS, Secretary of the Treasury,

Defendants.

_____/

ORDER

Before the Court is the Defendants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment and Incorporated Memorandum of Law (Dkt. 8), which was converted into a Motion for Summary Judgment (Dkt.9). The Plaintiff has filed a Response to Defendant's (sic) Motion for Summary Judgment as Provided Under Court Order of October 17, 2000 (Dkt. 10). After carefully considering the submissions of the parties, the Court concludes that the Defendants' Motion for Summary Judgment should be granted.

As gleaned from the parties' submissions, the material facts are undisputed. The Plaintiff filed a lawsuit on June 29, 1998, against the Secretary of the Treasury in Case Number 98-1358-Civ-T-24-E alleging

a cause of action for retaliation pursuant to Title VII of the Civil Rights Act of 1964. See Defendants' Exhibit 1. As noted by the Defendants, and as confirmed by a reading of the complaint filed in that case, the basis of the Plaintiff's claim "was premised upon allegations of retaliation for Plaintiff's complaints to the Department of the Treasury and the Equal Employment Opportunity Commission concerning alleged intemperate conduct by Plaintiff's former supervisor, Ron Prowler." The Court finds it significant that, as reflected on page 17 of Plaintiff's Document 32 attached to his Response, the Plaintiff acknowledged in court on February 26, 1999, that the basis for his "claim is that they violated my Fifth Amendment right to liberty."

The district judge assigned to the earlier case eventually granted summary judgment for the Secretary of the Treasury on September 16, 1999. See Defendants' Exhibit 2. In that order, the district judge also denied the Plaintiff's motion to amend the complaint in which he sought to add claims for retaliation under the American With Disabilities Act and the Rehabilitation Act of 1973. The Plaintiff appealed and the Eleventh Circuit Court of Appeals in an unpublished opinion issued May 9, 2000, affirmed both the grant of summary judgment and the denial of the motion to amend complaint. See Defendants' Exhibit 3. The mandate did not issue, however, until October 10, 2000. See Dkt. 116 in Case Number 98-1358.

The Plaintiff filed the instant lawsuit on August 8, 2000 (Dkt. 1). In the Court's view, although the Plaintiff has attempted to recast his claim as a constitutional tort based on the Fifth Amendment, there is no question that the operative events relied upon by the Plaintiff in initiating this latest action are the same events at issue in the prior action. Indeed,

the Plaintiff does not contend otherwise. His only contention is that "[n]either the district court nor the appellate court have ruled on the merits of this complaint of constitutional tort... which was properly filed in conjunction with the initial complaint..." See"page 2 of Plaintiff's Response.

Against this backdrop of materially undisputed facts, the Defendants argue that the doctrine of *res judicata* precludes the Plaintiff from bringing this latest action in view of the adverse resolution he suffered in the prior action. They are correct. Under this doctrine, a Plaintiff may not pursue claims which were actually raised or could have been raised in a prior suit on the merits when there is a final judgment in the prior suit, the decision in the prior suit was rendered by a court of competent jurisdiction, the parties, or those in privity with them, are identical in both suits, and both suits involve the same cause of action. See Ragsdale v. Rubbermaid, Inc., 193 F. 3d 1235, 1238 (11th Cir. 1999). As to the latter element, it is now clear in the Eleventh Circuit, "that if a case arises out of the same nucleus of operative fact, or is based upon the same factual predicate, as a former action, that the two cases are really the same 'claim' or 'cause of action' for purposes of res judicata." Citibank, N.A. v. Data Lease Financial Corp., 904 F. 2d 1498, 1503 (11th Cir. 1990).

In this case, given the undisputed facts, there can be no question that the four elements of *res judicata* have been satisfied. First, this case and the prior case involve the same cause of action because they clearly arise from the same nucleus of operative fact and rely on the same factual predicate. Moreover, as the Plaintiff has conceded, the claim he asserts in this case was always a part of the claim he asserted in the prior case.* Second, the parties to the two lawsuits obviously enjoy legal identity.** Finally, the prior

lawsuit was resolved against the Plaintiff by the entry of a final judgment on the merits by a court of competent jurisdiction.

In this Court's judgment, what the Plaintiff is seeking in this latest lawsuit is a "second bite at the apple" because of his dissatisfaction with the outcome of the earlier lawsuit. However, to allow the Plaintiff to pursue this latest case in light of the outcome of the earlier case would run afoul of the underlying purpose of the doctrine of *res judicata* which is to prevent the expense and vexation attending multiple lawsuits, to conserve judicial resources, and to foster reliance on judicial action by minimizing the possibility of inconsistent decisions. See Ragsdale, 193 F. 3d at 1238 (quoting Montana v. United States, 99 S. Ct. 970 (1979).

ACCORDINGLY, for the reasons expressed, *** it is **ORDERED AND ADJUDGED** as follows:

* Even if this were not, it is manifestly clear from the record that the Plaintiff was well aware of this so-called constitutional tort claim based on the Fifth Amendment at the very inception of the earlier case and, therefore, could easily have raised it in that case.

** As the Defendants correctly observe, the parties to both suits are the Plaintiff and the United States.

*** Because the Court agrees that *res judicata* mandates the entry of summary judgment for the Defendants, it need not reach the alternative argument advanced by the Defendants for summary judgment.

1) The Defendants' Motion for Summary Judgment (Dkt. 8) is granted.

2) The Defendants' Motion to Dismiss (Dkt. 8) is denied as moot.

3) The Clerk is directed to enter judgment for the Defendants.

4) The Clerk is directed to close this case.

DONE AND ORDERED at Tampa, Florida, on November 20, 2000.

"S/Richard A. Lazzara"
RICHARD A. LAZZARA
UNITED STATES DISTRICT JUDGE

COPIES FURNISHED TO:
Counsel of Record

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 99-2435 and 99-13735
Non-Argument Calendar

D.C. Docket No. 98-01358-CV-T-24E

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
MAY- 9 2000
THOMAS K. KAHN
CLERK

MELVIN E. BLOUGH,

Plaintiff-Appellant,

versus

LAWRENCE SUMMERS,
Secretary of the Treasury,

Defendant-Appellee.

Appeals from the United States District Court
for the Middle District of Florida

(May 9, 2000)

Before EDMONDSON, BLACK and MARCUS, Circuit Judges.

PER CURIAM:

Melvin E. Blough appeals the district court's denial of his motion for a preliminary injunction and grant of summary judgment in favor of the defendant in his pro se retaliation action, brought under Title VII, 42 U.S.C. section 2000e-1-17. He also appeals the district court's denial of his motion to amend his complaint. Blough failed to establish irreparable injury and the likelihood of success on the merits of his underlying claim and, therefore, the district court properly denied the preliminary injunction. Moreover, in the light of the district court's disposition of the case, the preliminary injunction issue is moot. Blough failed to meet his burden in establishing a prima facie claim of retaliation or that the defendant's nondiscriminatory reasons for its "adverse action" (assigning him, as an IRS agent, to audit only small entities) were pretextual. Summary judgment for the defendant, therefore, was proper. The district court also did not abuse its discretion when it denied Blough's motion to amend his complaint.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 99-2435 and 99-13735-FF

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
SEP 26 2000
THOMAS K. KAHN
CLERK

MELVIN E. BLOUGH,

Plaintiff-Appellant,

versus

LAWRENCE SUMMERS,
Secretary of the Treasury,

Defendant-Appellee.

On Appeal from the United States District Court for the Middle District of Florida

---

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, ____F.2d__).

BEFORE: EDMONDSON, BLACK and MARCUS, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

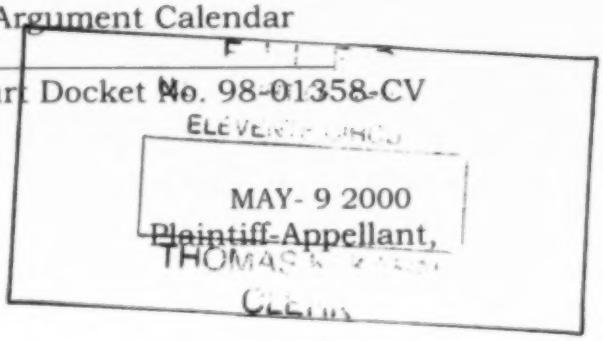
"S/J. L. Edmondson"
UNITED STATES CIRCUIT JUDGE

ORD-42

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Nos. 99-2435 and 99-13735
Non-Argument Calendar

District Court Docket No. 98-01358-CV



MELVIN E. BLOUGH,

Plaintiff-Appellant,

versus

LAWRENCE SUMMERS,
Secretary of the Treasury,

Defendant-Appellee.

Appeals from the United States District Court
for the Middle District of Florida

Before EDMONDSON, BLACK and MARCUS, Circuit Judges.

JUDGMENT

These causes came to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and were taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the

judgments of the said District Court in these causes be and the same are hereby AFFIRMED;

IT IS FURTHER ORDERED THAT plaintiff-appellant pay to defendant-appellee, the costs on appeal to be taxed in accordance with Fed.R.App.P.39.

Entered: May 9, 2000
For the Court: Thomas K. Kahn, Clerk

By: "S/Karen McHale"
Deputy Clerk

ISSUED AS MANDATE: OCT 10 2000

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

FILED

99 SEP 17 PM 1:15

CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA, FLORIDA

MELVIN E. BLOUGH,

Plaintiff,

v. Case No. 98-1358-C.V.-T-24(E)

ROBERT E. RUBIN,
Secretary of the Treasury,

Defendant.

_____/

ORDER

This cause comes before the Court on defendant's Motion for Summary Judgment (Doc. No. 75). Plaintiff has filed a response in opposition (Doc. No. 107). Also before the Court is plaintiff's Motion to Amend Complaint (Doc. No. 33) and defendant's response in opposition (Doc. No. 36). Plaintiff has also filed various papers which appear to be addressed to his Motion to Amend Complaint and/or his response to defendant's Motion for Summary Judgment. See Doc. Nos. 104 and 105.

I. Background

Plaintiff filed the instant action against the defendant pursuant to Title VII of the Civil Rights Act of 1964. Plaintiff alleges employment discrimination based on reprisal for prior complaints he made to his

agency and to the Eqwual Employment Opportunity Commission ("EEOC").

Plaintiff is a GS-13 revenue agent employed by the Internal Revenue Service. Plaintiff is responsible for conducting audits of tax-exempt organizations. In October of 1993, plaintiff filed an administrative claim of employment discrimination. Apparently, plaintiff's complaint was founded on the alleged behavior of his supervisor (Ron Prowler), which took place prior to October 1, 1991. Prowler ceased to be plaintiff's supervisor in October of 1991, and plaintiff has not been under Prowler's supervision since then. In mid-1995, plaintiff made a formal request that he not be required to work under Ron Prowler's supervision at any time.

In September, 1995, Prowler is alleged to have made a physical threat against plaintiff while speaking to another IRS employee. In response, plaintiff filed another administrative claim of discrimination, which was unsuccessful.

In October of 1997, the Employee Plans/Exempt Organizations Division in which plaintiff works re-organized, and a new "group" was created to handle all coordinated examination program audits ('CEP Audits"). Ron Prowler was assigned to supervise the new group ("Group 7214"). Group 7214 handles all CEP Audits in Florida. Not being a member of Group 7214, plaintiff does not work on CEP cases in Florida due to the fact that Group 7214 is supervised by Prowler. Plaintiff continues to work as a GS-13 revenue agent, and receives the same pay and benefits that he would receive if he were a member of Group 7214, or if he otherwise worked on CEP Audits in Florida.

The crux of plaintiff's claim is that due to the fact that he is de facto excluded from working in Group 7214 (and thus on CEP Audits) due to Prowler's supervision of the group, he is entitled to relief under Title VII. Specifically, plaintiff alleges that the re-organization which led to the creation of Group 7214 and Prowler's appointment as supervisor of Group 7214 was done in retaliation against him for his prior administrative and EEOC complaints. Although plaintiff concedes that he has not received a reduction in pay, pay grade, benefits, or any other pecuniary losses, he contends that adverse employment action was taken against him due to the fact that he is now "limited to [auditing] the lowest priority and smallest tax-exempt entities."

II. Standard for Summary Judgment

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law " Fed. R. Civ. P. 56(c). The moving party bears the initial burden of showing the Court, by reference to materials on file that there are no genuine issues of material fact that should be decided at trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Clark v. Coats & Clark, Inc., 929 F. 2d 604 (11th Cir. 1991). When a moving party has discharged its burden, the non-moving party must then go beyond the pleadings, and by its own affidavits, or by depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial. In determining whether the moving party has met its burden of establishing that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law, the Court must draw inferences from the evidence in the light most

favorable to the non-movant and resolve all reasonable doubts in that party's favor. Spence v. Zimmerman, 873 F. 2d 256 (11th Cir. 1989); Samples on behalf of Samples v. City of Atlanta, 846 F. 2d 1328, 1330 (11th Cir. 1988).

III. Discussion

As stated, plaintiff's claim is one for retaliation under Title VII of the Civil Rights Act of 1964. However, plaintiff has sought leave to amend his complaint to add claims for retaliation under the American With Disabilities Act ("ADA") and the Rehabilitation Act of 1973 ("Rehab. Act"). Without reaching the merits of plaintiff's motion to amend, the Court noted that a retaliation claim under the ADA and Rehab. Act are evaluated using the same framework as a claim of retaliation under Title VII. See, Griffin v. GTE Florida, Inc., 182 F. 3d 1279 (11th Cir. 1999). Therefore, the Court's decision on the instant motion for summary judgment would be the same under Title VII, the ADA, or the Rehab. Act.

To establish a prima facie case of retaliation, a plaintiff must show: (1) a statutorily protected expression; (2) adverse employment action; and (3) a causal link between the protected expression and the adverse action. See Stewart v. Happy Herman's Chesire Bridge, Inc., 117 F. 3d 1278, 1287 (11th Cir. 1997). Once a plaintiff has established a prima facie case, the defendant must come forward with a legitimate reason for the employment action to negate the inference of retaliation. See Taylor v. Ruynon, 175 F. 3d 861, 868 (11th Cir. 1999). If the defendant does so, the plaintiff bears the burden of proof that the defendant's offered reasons are pretextual. See id.

In this case, neither party seems to disagree that plaintiff has engaged in protected activity under Title

VII during his tenure at the IRS. Rather, it is the two remaining elements of plaintiff's prima facie case which are disputed.

A. Adverse Employment Action

Defendant contends that the undisputed facts show that no adverse employment action was taken against the plaintiff. As discussed, plaintiff concedes that he has not received a reduction in pay, pay grade, benefits, or any other pecuniary losses. Rather, he contends that adverse employment action was taken against him due to the fact that he is now "limited to [auditing] the lowest priority and smallest tax-exempt entities."

In Wideman v. Wal-Mart Stores, Inc., 141 F3d 1453 (11th Cir. 19980, the court held that retaliatory discrimination extends to adverse actions which fall short of ultimate employment decisions. In fact, the court rejected the argument that "adverse employment action" must be activity such as discharge, demotion, or failure to hire. Thus, the fact that plaintiff is being limited to auditing the lowest priority and smallest tax-exempt entities could be considered adverse employment action for the purpose of Title VII.

B. Causal Relation

To establish the causal relation element of this prima facie case, plaintiff must show that the protected activity and the adverse action are not completely unrelated. See Wideman, 141 F. 3d at 1457. One particular factor which may tend to prove or disprove a causal link in a retaliation case is the amount of time between the protected activity and the adverse employment action. See Donnellon v. Fruehauf Corp., 794 F. 2d 598, 601 (11th Cir. 1986).

In this case, the span of time between plaintiff's last protected activity (the December 1995 complaint) and the adverse employment action (the October 1997 formation of Group 7214 under Prowler's supervision) is almost two years. This fact, in-and-of itself, belies any assertion of a causal link between the protected activity and the adverse action. Futhermore, it is an undisputed fact that the impetus for the "Group 7214 decision" lies in a prior decision made by the national IRS office in 1997 which directed the "Southeast Key District" to handle cases arising in other districts. See Declaration of Deane Cox at 3. It is also an undisputed fact that prior to the formation of group 7214, Prowler was the only group manager in Florida with supervisory authority over CEP cases, and that his assignment to Group 7214 was a lateral, non-competitive transfer. See id. at 4. Thus, given the record evidence as a whole, there is no material disputed facts which tend to show any casual link between the protected activity asserted and the adverse employment action as stated. For this reason, plaintiff has failed to state a prima facie case of retaliation.

C. Legitimate Reason and Pretext

Even assuming that plaintiff has stated a prima facie case, his retaliation claim still must fail. Defendant has offered a legitimate, non-discriminatory reason for the "adverse employment action" at issue. Namely, defendant has pointed to undisputed records evidence which shows that Group 7214 was formed and put under Prowler's supervision as a response to a mandate issued by the IRS's national office in 1997. See Declaration of Deane Cox at 3-4. Defendant has also pointed to undisputed record evidence which establishes that deviation from the standard CEP procedure requires national office approval and is cumbersome, and has thus stated a legitimate reason

for not excluding cases from the CEP program so that plaintiff can work on them in his current assignment. See id. at 5.

With defendant's non-discriminatory reasons stated, plaintiff has failed to point to a shred of evidence which shows or that even tends to show that defendant's reasons are pretextual. Instead, plaintiff merely restates his allegations, and would have the Court believe that such an elaborate and multi-faceted re-organization of an IRS division took place as an effort to discriminate against him. While not impossible, not one piece of record evidence supports plaintiff's theory.

Accordingly, it is ORDERED AND ADJUDGED that defendant's Motion for Summary Judgment (Doc. No. 75) is GRANTED. The Clerk is instructed to CLOSE Case No. 98-1358-Civ.-T-24(E). Plaintiff's Motion to Amend Complaint (Doc. No. 33) is DENIED for the reasons set forth in this Order. All other motions pending in this action are DENIED AS MOOT.

DONE AND ORDERED at Tampa, Florida, this 16th day of September, 1999.

"S/Susan C. Bucklew"
SUSAN C. BUCKLEW
United States District Judge

Copies to:

Counsel of Record
Courtroom Deputy

CONSTITUTIONAL PROVISIONS, PUBLIC LAWS, STATUTES AND RULES INVOLVED

CONSTITUTION OF THE UNITED STATES

We, the people of the United States, in order to form a more perfect Union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

Article 1. section 8. The Congress shall have power -

To declare war:

To raise and support armies:

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof.

Article 3. section 2, clause 1. Jurisdiction of Courts

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, ... to Controversies to which the United States shall be a Party ...

AMENDMENTS TO THE CONSTITUTION

The Fifth Amendment to the United States Constitution provides in part that "no person shall be ... deprived of life, liberty, or property, without due process of law ...." U.S. Const. amend V.

PUBLIC LAWS AND STATUTES

PUBLIC LAW 78-359
(June 27, 1944)
"Veterans' Preference Act of 1944"

Sec. 18. All Acts and parts of Acts inconsistent with the provisions hereof are hereby modified to conform herewith, and this Act shall not be construed to take away from the preference eligible any **rights** heretofore granted to, or possessed by, him under any existing law, Executive order, civil-service rule or regulation, of any department of the Government or officer thereof.

PUBLIC LAW 85-857
(Sept. 2, 1958)
"Veterans' Benefits"

Title 38 U.S.C., Part II, Chapter 11:

Compensation for Service-Connected Disability or Death.

Subchapter II - Wartim eDisability Compensation

Sec. 310. Basic entitlement. For disability resulting from personal injury suffered or disease contacted in line of duty..... in the active military, naval, or air service, during a period of war, the United States will pay to any veteran thus disabled ..... compensation as provided in this subchapter.

Sec. 314. Rates of wartime disability compensation. For the purpose of section 310 of this title -

(j) if and while the disability is rated as total the monthly compensation shall be $225;

TITLE 38 UNITED STATES CODE
(2000)
Veterans Benefits
Part II, Chapter 11:

Compensation for Service-Connected Disability or Death.

Subchapter II - Wartim eDisability Compensation.

Sec. 1110. Basic entitlement. For disability resulting from personal injury suffered or disease contracted inline of duty .... in the active military, naval, or air service, during a period of war, the United States will pay to any veteran thus disabled ..... compensation as provided in this subchapter...

Sec. 1114. Rates of wartime disability compensation. For the purpose of section 1110 of this title -

(j) if and while the disability is rated as total the monthly compensation shall be $2,036;

CIVIL RIGHTS ACT OF 1964
Senate Report (Judiciary Committee) No. 872
Feb. 10, 1964 [To accompany S. 1732]
House Report (Judiciary Committee) No. 914
Nov. 20, 1963 [To accompany H.R. 7152]
Cong. Record Vol. 110 (1964)

Section 713 provides that this title will not repeal or modify any Federal, State, territorial, or local law creating special **rights** for veterans.

PUBLIC LAW 88-352
(July 2, 1964)
"Civil Rights Act of 1964"

TITLE VII --- EQUAL EMPLOYMENT OPPORTUNITY

Sec. 712. Nothing contained in this title shall be construed to repeal or modify any Federal, State, territorial, or local law creating special **rights** or preference for veterans.

PUBLIC LAW 92-261
(March 24, 1972)
"Equal Employment Opportunity Act of 1972"

Sec. 11. Title VII of the Civil Rights Act of 1964 is amended by adding at the end thereof the following new section:

NONDISCRIMINATION IN FEDERAL GOVERNMENT EMPLOYMENT

Sec. 717. (a) All personnel actions affecting employees ....., in executive agencies as defined in section 105 of title 5, United States Code, ... shall be made free from any discrimination based on race, color, religion, sex, or national origin.

TITLE 42 UNITED STATES CODE
(2000)
The Public Health and Welfare
Chapter 21 - Civi lRights

Subchapter VI - Equa lEmployment Opportunities

Sec. 2000e-11. Veterans special **rights** or preference

Nothing contained in this subchapter shall be construed to repeal or modify any Federal, State, territorial, or local law creating special **rights** or preference for veterans.

Sec. 2000e-16. Employment by Federal Government

(a) All personnel actions affecting employees ..... in executive agencies as defined in section 105 of title 5 ..... shall be made free from any discrimination based on race, color, religion, sex, or national origin.

TITLE 28 UNITED STATES CODE

Judiciary and Judicial Procedure

Section 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Section 1291. Final decisions of district courts

The courts of appeal ..... shall have jurisdiction of appeals from all final decisions of the district courts of the United States...

Section 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 15 (a) Amendments. A party may amend the party's pleadings once as a matter of course at any time before a responsive pleading is served ... Otherwise a party may amend the party's pleadings only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading ..... within 10 days after service of the amended pleading.

Rule 54(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

RULES OF THE SUPREME COURT OF THE UNITED STATES

Rule 10. Considerations Governing Review on Certiorari

A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) A United States court of appeals .... has so far departed from the accepted and usual course of judicial proceedings or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power...

(c) A United States court of appeals .... has decided an important federal question in a way that conflicts with relevant decisions of this Court.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

FILED

98 JUN 29 AM 8:30

CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA, FLORIDA

Melvin E. Blough

Plaintiff

Case No. 98-1358Civ-T-24E

V.

Robert E. Rubin, Secretary of the Treasury

Defendant

COMPLAINT

1. PLAINTIFF:

   Melvin E. Blough
   803 Tomahawk Trail
   Brandon, FL 33511

2. Defendant:

   Robert E. Rubin, Secretary of the Treasury
   United States Department of the Treasury
   Office of Equal Employment Opportunity Program
   Building Annex Room 510
   1500 Pennsylvania Avenue, N.W.
   Washington, D.C. 20220

3. JURISDICTIONAL PLEA:

This employment discrimination action is brought pursuant to Title VII of the Civil Rights Act of 1964, as amended. Jurisdiction is specifically conferred on this Court by 42 U.S.C. 2000e-5(f). Equitable and other relief is sought under 42 U.S.C. 2000e-5(g).

4. ALLEGATION:

The United States Government Department of the Treasury (Defendant/employer) has engaged in the unlawful and unconscionable employment practice of threatening physical injury to a disabled veteran (Plaintiff/employee) and continues said practice in retaliating against the Plaintiff/employee for filing a discrimination complaint with the U.S. Equal Employment Opportunity Commission (EEOC).

5. DISCRIMINATORY CONDUCT OF DEFENDANT (EMPLOYER):

42 U.S.C. 1997d Prohibition of Retaliation - No person reporting conditions which may constitute a violation under this subchapter shall be subject to retaliation in any manner for so reporting.

An employee who files formal charges with the EEOC against the employer is assured legal recourse under section 704(a) of Title VII of the Civil Rights Act of 1964 against any action taken in retaliation by the employer.

6. FACTS IN SUPPORT OF ALLEGATION:

Plaintiff is currently and has been an employee (Internal Revenue Agent) of the Defendant for nineteen years. Plaintiff, who has never been the

subject of disciplinary action by the Defendant, has consistently received outstanding annual performance evaluations and commendations from the Department of Justice/National Office Internal Revenue Service.

Plaintiff is a disabled Viet Nam veteran with two artifical legs and the loss of use of one hand.

THREATS

In 1991 an IRS manager (Ron Prowler) did threaten Plaintiff with physical injury when Plaintiff refused his request for a listing of confidential informants. Plaintiff reported the threat to the Division Chief (Terry Hallihan); however no disciplinary actions are known to have been taken against Mr. Prowler. Plaintiff had no further contact with Mr. Prowler and did not pursue the matter.

On September 18, 1995 Plaintiff notified (verbally and in writing) the new Division Chief (Pat Cox) of the previous threat by Mr. Prowler and requested that Mr. Prowler not be assigned supervisory authority over Plaintiff.

On September 21, 1995 Mr. Prowler met with Plaintiffs (then) current manager (Genny Farley) and reportedly went into a long dissertation on how much he hated Plaintiff and stated "he would push (Plaintiff) down a flight of stairs if he thought he could get away with it". Ms. Farley was concerned over the safety of Plaintiff and immediately informed Plaintiff of the threat. Ms. Farley reportedly informed the Division Chief a few days later. Plaintiff called the IRS Inspection Service and was informed that nothing could be done unless Mr. Prowler assaulted Plaintiff. When Plaintiff inquired as to the possibility of obtaining a

civil restraining order the Inspectors response was that the Hillsborough County Court wouldn't get involved in a Federal matter.

Again, no disciplinary actions are known to have been taken against Mr. Prowler.

On December 19, 1995 Plaintiff filed a discrimination complaint under 29 CFR PART 1614 with the Department of the Treasury (Agency). Plaintiff's complaint was not accepted by the Agency and the EEOC affirmed the dismissal of the complaint on the following basis -

"a complaint must point to an 'injury in fact' in order to be aggrieved. Simple conjecture as to alleged future injury is not sufficient". Altimus v. Department of Defense, EEO Request NO. 05920768, 93 feor 3267 (EEOC COMM.1993).

RETALIATION

Effective October 1, 1997 Mr. Prowler received a promotion which resulted in a demotion for Plaintiff in his assigned duties (no effect upon compensation). Plaintiff was informed in writing by the Division Chief (Pat Cox) that the only way Plaintiff would be permitted to continue conducting examinations of the largest and most complex entities was to make application to work for Mr. Prowler.

On November 18, 1997 Plaintiff filed a second descrimination complaint with the Agency under 29 CFR PART 1614 based upon a claim of retaliation by IRS management for the initial complaint filed with the EEOC.

The second discrimination complaint (Retaliation), which was accepted by the Agency, is directly and transactionally related to the initial discrimination complaint in that the Defendant ignored and accepted the threats by Mr. Prowler against Plaintiff and then maliciously required Plaintiff to work under the supervision of Mr. Prowler if he wished to perform the same types of examinations which he had conducted under the supervision of other managers during the period February 1989 through September 1997.

Since October 1, 1997 Plaintiff has been assigned the equivalent of one months work which was limited to the examination of very small entities.

The Defendants prohibited retaliatory action has taken form in the manipulation of Plaintiffs employment conditions (assignments/duties) such as to constitute harrassment.

The record clearly demonstrates that were it not for the appointment of Mr. Prowler as the manager of those employees conducting examinations of the largest and most complex entities, Plaintiff would not have been excluded from said examinations. Plaintiff has therefore suffered a personal loss or harm with respect to a condition of employment.

CONCLUSION

Plaintiff continues to fear the violent nature of Mr. Prowler. If a person with two artifical legs and loss of use of one hand is pushed down a flight of stairs that person would be seriously injured and possibility killed.

The threats by Mr. Prowler and the protection afforded him by the defendant have taken a toll

upon Plaintiff both mentally and physicially over the past seven years. Mr. Prowler works in Ft. Lauderdale and Plaintiff works in St. Petersburg. Defendant addressed the threat made in 1995 by taking administrative procedures to insure that Mr. Prowler had very limited contact with the Plaintiff. Plaintiff did make written requests of Defendant to avoid all contact with Mr. Prowler; however said requests were denied by Defendant.

The Agency and the EEOC did not have an effective complaint procedure to address threats against Plaintiff. This is evidenced by the failure of the defendant to address the reported direct and indirect threats by Mr. Prowler against Plaintiff and the conclusion of the Agency/EEOC that "there must be an injury in fact". The failure of the Defendant to address the reported threats and the conclusion rendered by the Agency/EEOC are properly viewed in the light of the June 26, 1998 United States Supreme Court decision in Burlington v. Ellerth. In the case at point, Defendant had knowledge of the threats by Mr. Prowler and blatantly retaliated against Plaintiff such are to constitute harrassment.

7. CURRENT STATUS OF DISCRIMINATION COMPLAINT FILED WITH AGENCY:

The Agency has failed to timely bring final action on said complaint of descrimination. Plaintiff therefore initiates civil action as provided in section 2000e-5. (42 U.S.C. 2000e-16(c)).

In correspondence dated April 15, 1998 Plaintiff was notified by Agency that investigation was complete. On April 21, 1998 Plaintiff did request a final decision from the Agency in accordance with 29 CFR section 1614.110 of the EEOC Regulations.

The sixty day period specified in section 1614.110 has expired without a final decision by the Agency.

Plaintiff is not an attorney and apologizes to the Court, which is burdened with a heavy case load, for the necessity to bring this action.

8. If relief is not granted, Plaintiff will be irreparably denied rights by Title VII of the Civil Rights Act of 1964, as amended.

9. WHEREFORE, Plaintiff prays that the Court grant such relief as may be appropriate, including injunctive orders, damages, costs, and attorney's fees.

"S/Melvin E. Blough" pro se

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803 Tomahawk Trail
Brandon, FL 33511
(813) 651-2778

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Melvin E. Blough,

Plaintiff,

V. Case No. 98-1358-CIV-T-24(E)

Robert E. Rubin, Secretary of the Treasury,

Defendant,

MOTION

Plaintiff requests permission of the Court to file an additional memorandum in support of the motion for preliminary injunction for the purpose of providing a record and stating Plaintiff's position in advance of the scheduled hearing.

This motion does not alter the nature of the relief requested in the motion for a preliminary injunction. Permission is requested in the interest of fully considering the motion for a preliminary injunction.

In Haines v Kerner, 92 S CT 594 (1972) the United States Supreme Court did note that the pleadings of a pro se complaint are held to less stringent standards than formal pleadings drafted by lawyers. Plaintiff is uncertain if this request is subject to the administrative provisions of M. D. Fla. R. 3.01(a) or

4.06(b) and therefore relies upon a determination by this Court. Plaintiff has no objection to a continuance of the scheduled hearing to March 5, 1999 (or a later date at the convenience of the Court) if the Court deems it necessary.

RELEVANT LEGAL STANDARDS FOR AND APPLICATIONS OF INJUNCTIVE RELIEF

1. Sampson v. Murry, 94 S. Ct. 937 (1974)

   Use of the district court's injunctive power in cases of discharge of probationary employees should be reserved for the genuinely extraordinary situation rather than the routine case.

   Considering the disruptive effect that the g ran tof temporary relief here was likely to have on the administrative process, and in view of the historical denial of all equitable relief by federal courts in disputes involving discharge of Government employees; the well - established rule that the Gover nment be granted the widest latitude in handling its own internal affairs; and the traditional unwillingness of equity courts to enforce personal service contracts, the Court of Appeals erred in routinely applying the traditional standards governing more orthodox "stays," and respondent at the very least must show irreparable injury sufficient in kind and degree to override the foregoing factors.

2. Canal Authority of State of Florida v. Callaway, CA 5 Cir. (1974) 489 F.2d 567

   Prerequisites for grant of pre liminary injunction are: substantial likelihood that plaintiff will prevail on the merits, substantial threat that plaintiff will suffer irreparable injury if injunction is not granted, threatened injury to plaintiff outweighing threatened harm injunction may do to defendant and absence of

disservice to the public interest if the injunction should be granted.

Only those injuries that cannot be redressed by application of a judicial remedy after hearing on the merits can properly justify a preliminary injun ction.

Preliminary injunction should not be issued to protect status quo unless court's ability to render meaningful decision on merits would otherwise be in jeopardy.

If currently existing status quo itself is causing one of parties to suit irreparable injury, it may be necessary to alter situation by grant of preliminary injunction so as to prevent injury, thereby returning to last uncontested status qou between parties, or by allowing parties to take proposed action that court finds will minimize irreoarable injury; focus always must be on prevention of injury by proper order, not merely on preservation of status quo.

3. Parks v. Dunlop, CA 5 Cir. (1975) 517 F. 2d 785

Central purpose of a preliminary injunction is to prevent irreparable harm; it is the threat of harm which cannot be undone which authorizes exercise of the court's equitable power to enjoin before the merits are fully determined.

4. Gonzalez v. Chasen, U.S.D.C. Puerto Rico (1980) 506 F. Supp. 990

While equity will not ordinarily attempt to control discretion, discretionary powers of public officers which are exercised arbitrarily, maliciously, in bad faith, and without a right purpose are unlawful, and one suffering irreparable injury from such acts may have them enjoined.

5. Stromfeld v. Smith, USDC S.D. New York (1983) 557 F. Supp. 995

Harm that can be remedied monetarily does not qualify as irreparable, for purposes of temporary injunctive relief.

Federal employee challenging action of federal agency must establish higher degree of harm for temporary injunctive relief, and must show that "extraordinary" harm will result if interm relief is denied.

Though court has obligation to enjoin governmental action that violates applicable statutes, federal employees, to obtain temporary injunctive relief, must demonstrate irreparable harm outweighing government interest in unfettered internal regulation.

6. Pope v. Bond, D.C.D.C. (1985) 613 F. Supp. 708

Only "adverse actions" are appealable by public employee to the Merit Systems Protection Board.

7. Snyder v. Sullivan, S. Ct. Co. (1985) 705 P.2d 510

"Injunction" is generally preventive and protective remedy, aimed at future acts, and is not intended to redress past wrongs.

8. Nichols v. Frank, D.Or. (1991) 771 F. Supp. 1075

Title VII sexual harassment plaintiff was not entitled to injunction ordering that discrimination to which she had been subjected by her supervisor not be repeated absent demonstration of likelihood that she would be forced to return to post office where supervisor was employed or that she would be placed in situation where harassment was likely to be repeated.

RELEVANT LEGAL STANDARDS FOR AND APPLICATIONS OF CONSTITUTIONAL RIGHTS

Constitution of the United StatesAmendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

1. Bell v. Hood, 66 S. Ct. 777

   "The very essence of civil liberty," wrote Mr. Chief Justice Marshall in Marbury v. Madison, 5 U.S. 137, 163, 1Cranch 137, 163, 2 L.Ed. 60 (1803), "certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." Traditionally, therefore, "it is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution.

2. Hovey v. Elliott, 17 S. Ct. 841 (1897)

   Denial of Right to Defend – Du eProcess of Law:

   The principle, stated in this terse language, lies at the foundation of all well-ordered systems of jurisprudence. Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations.

That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted.

3. Chicago, B. & Q. R. Co. v. McGrire, 31 S. Ct. 259 (1911)

In dealing with the relation of employer and employed, the legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression. What differences, as to the extent of this power, may exist with respect to particular employments, and how far that which may be authorized as to one department of activity may appear to be arbitrary in another, must be dtermined as cases are presented for decision.

4. Palko v. State of Connecticut, 58 S. Ct. 149 (1937)

The Fifth Amendment is not directed to the States, but solely to the federal government.

5. Bolling v. Sharpe, 74 S. Ct. 693 (1954)

The concepts of equal protection of the laws and due process both stem from the American ideal of fairness, and are not mutually exclusive, nor are the concepts always interchangeable, in that equal protection of the laws is a more explicit safeguard of prohibited unfairness than due process of law, but a discrimination may nevertheless be so unjustifiable as to be violative of due process.

The term "liberty" within the Fifth Amendment to the Federal Constitution is not confined to mere freedom from bodily restraint, but it extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper government objective.

6. Fuentes v. Shevin, 92 S. Ct. 1983 (1972)

Central meaning of "procedural due process" is that parties whose rights are to be affected are entitled to be heard and, in order that they may enjoy that right, they must first be notified.

No later hearing and no damage award can undo fact that arbitrary taking that was subject to right of procedural due process has already occurred.

Relative weight of liberty or property interests is relevant to form of notice and hearing required by due process before deprivation of such liberty or interest, but some form of notice and hearing, formal or informal, is required before deprivation of property interests that cannot be characterized as de minimus.

6. Perry v. Golub, USDC Alabama, (1975) 400 F. Supp. 409

Where federal officer's "permanent reassignment" was to silence his protests against irregularities and to punish him for not heeding instructions to "leave it alone" and where decision to reassign was arbitrary and an abuse of administrative discretion and was taken without any of the prerequisite procedural safeguards required by administrative regulations, there was infringement of officer's First Amendment and Fifth Amendment rights.

8. Washington v. Davis, 96 S. Ct. 2040 (1976)

"We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today.

It is also true that the Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups. "

9. Davis v. Passman, 99 S. Ct. 2264 (1979)

One of the important objects of the Federal Constitution is the designation of rights and, in its great outlines, the judiciary is clearly discernible as the primary means through which these rights may be enforced.

"The term 'cause of action' as used in this case, refers to whether a plaintiff is a member of a class of litigants that may, as a matter of law, appropriately invoke the power of the court. Since petitioner rests her claim directly on the Due Process Clause of the Fifth Amendment, claiming that her rights under that Amendment have been violated and she has no effective means other than the judiciary to vindicate these rights, she is an appropriate party to invoke the District Court's general federal – question jurisdiction to seek relief, and she therefore has a cause of action under the Fifth Amendment.

The Fifth Amendment provides that ' no person shall be ..... deprived of life, liberty, or property, without due process of law ....'. In numerous decisions, this Court ' has held that the Due Process Clause of the Fifth Amendment forbids the Federal Government to deny equal protection of the laws."

10. City of Springfield, Mass. v.. Kibbe, 107 S. Ct. 1114 (1987)

"The Court repeatedly has stressed the need to find a direct causal connection between municipal conduct and the constitutional deprivation. See, e.g., Oklahoma City v. Tuttle, 471 U.S., at 824-825, n. 8, 105 S. Ct., at 2436, n. 8 (requiring 'affirmative link' between municipal policy and constitutional violation); Polk County v. Dodson, 454 U.S. 312, 102 s. Ct. 445, 70 L.Ed.2d 509 (1981) (municipal policy must be 'moving force' behind constitutional deprivation). In Monell v. New York City Dept. of Social Services, 98 S. Ct. 2018 (1978) the policy at issue commanded the deprivation of

constitutional rights. The causal link between the municipal policy and the constitutional vio lation therefore was readily apparent: no 'evidence was needed other than a statement of the policy by the municipal corporation, and its exercise."

11. Fela v. U.S. Merit Systems Protection Bd., N.D. Ohio (1989) 730 F. Supp. 779

Due Process Clause of Fifth Amendment is a limitation on arbitrary authority.

12. Bank of Jackson County v. Cherry , 11 th. Cir. (1993) 980 F.2d. 1362

" A. Due Process Claim

The government may not deprive any person of 'life, liberty or property without due process of law .'

To prevail upon its procedural due process claim, BJC must establish: (1) a constitutionally protected interest in life, liberty or property; (2) governmental deprivation of that interest; and (3) the constitutional inadequacy of procedures accompanying the deprivation. See Lehr v. Robertson, 103 S. Ct. 2985, 2900 (1983).

1. Property Interest

A property interest must rest upon 'a legitimate claim of entitlement.' Roth, 92 S. Ct. at 2709.

2. Liberty Interest

Liberty interests are both broader and more difficult to define than property interests. As the Supreme Court stated nearly seventy years ago: Liberty denotes not merely freedom from bodily restraint, but also the right of the individual to .....enjoy those privileges long recognized as es sential to the orderly pursuit of happiness by free men. Meyer v.

Nebraska, 43 S. Ct. 625 (1923). 'In a Constitution for a free people, there can be no doubt that the meaning of liberty must be broad indeed." Roth, supra.

13. Holmes v. U.S., M.D. Ala. (1994) 868 F. Supp. 1348

"More recently, in Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 111 S. Ct. 1032, 113 L.Ed.2d 1 (1991), the Supreme Court held that imposing liability upon an employer, under an apparent authority theory, for an employee's fraudulent acts did not violate the employer's due process rights. The Court recognized imposing liability on the party who is in a position 'to guard substantially against the evil to be prevented' creates a strong incentive for vigilance by that party."

14. McKinney v. Pate, 20 F.3d 1550, 1560 (11th Cir.) 1994

The court held that substantive due process rights differ from procedural due process rights in the manner in which a violation of those rights occur:

"A violation of a substantive due process right, for instance, is complete when it occurs; hence, the availability vel non of an adequate post-deprivation state remedy is irrelevant. Because the right is 'fundamental,' no amount of process can justify its infringement. By contrast, a procedural due process violation is not complete 'unless and until the State fails to provide due process."

15. Women Prisoners of D.C. Dept. of Corr. v. D.C., D.D.C. (1995) 899 f. Supp. 659

Common method of proving a threat of future tort to be prevented by injunction is by proving past tort under conditions that render its repetition or continuance probable, but it is not necessary to issuance of injunction to prove past wrong.

16. Washington v. Glucksberg, 117 S. Ct. 2258 (1997)

Due process clause guarantees more than fair process, and "liberty" it protects includes more than absence of physical restraint.

Due process clause provides heightened protection against government interference with certain fundamental rights and liberty interests.

"We begin, as we do in all due-process cases, by examining our Nation's history, legal traditions, and practices.

But we 'have always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this unchartered area are scarce and open-ended.' Collins, 503 U.S., at 125, 112 S. Ct., at 1068. By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action.

Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' id., at 503, 97 S. Ct., at 1938 (plurality opinion); Snyder v. Massachusetts, 291 U.S. 97, 105, 54 S. Ct. 330, 332, 78 L. Ed. 674 (1934) ('so rooted in the traditions and conscience of our people as to be ranked as fundamental'), and 'implicit in the concept of ordered liberty,' such as that 'neither liberty nor justice would exist if they were sacrificed," Palko v. Connecticut, 302 U.S. 319, 325, 326, 58 S. Ct. 149, 152, 82 L. Ed. 288 (1937). Second, we have required in substantive-due-process cases a 'careful

description' of the asserted fundamental liberty interest. Flores, supra, at 302, 113 S. Ct., at 1447; Collins, supra, at 125, 112 S. Ct., at 1068; Cruzan, supra, at 277-278, 110 S. Ct., at 2850-2851. Our Nation's history, legal traditions, and practices thus provide the crucial 'guideposts for responsible decisionmaking," Collins, supra, at 125, 112 S. Ct., at 1068, that direct and restrain our exposition of the Due Process Clause. As we stated recently in Flores, the Fourteenth Amendment ' forbids the government to infringe ..... 'fundamental' liberty interests at all, no matter what process is provide, u nless the infringement is narrowly tailored to serve a compelling state interest. " 507 U.S. at 302, 113 S. Ct., at 1447.

RELEVANT LEGAL STANDARDS FOR AND APPLICATIONS OFIRREPARABLE INJURY

1. City of Los Angeles v. Lyons, 103 S. Ct. 1660 (1983)

   Emotional consequences of prior act are not sufficient basis for injunctive relief absent real and immediate threat of future injury by defendant, though emotional up-set is relevant consideration in damages action.

   The "capable-of-repetition," doctrine applies only where named plaintiff can make reasonable showing that he will again be subjected to the alleged illegality.

   Equity remedy of injunction was unavailable absent showing of irreparable injury, a requirement that cannot be met where there is no showing of any real or immediate threat that plaintiff will be wronged again.

2. Goldie's Bookstore v. Super. Ct. of State of Cal. CA 9 th Cir. (1984) 739 F.2d 466

   Speculative injury does not constitute irreparable injury sufficient to warrant granting of preliminary injunction.

Alleged constitutional infringement will often alone constitute irreparable harm sufficient to warrant granting of preliminary injunction.

3. Hohe v. Casey, CA 3rd Cir. (1989), 868 F.2d 69

"It is 'purposeful unconstitutional (government) suppression of speech (which) constitutes irreparable harm for preliminary injunction purposes.' Goldie's Bookstore v. Superior Ct., 739 F.2d 466, 472 (9th Cir. 1984). Accordingly, it is the 'direct penalization, as opposed to incidental inhibition, of First Amendment rights (which) constitute irreparable injury.' Cate v. Oldham, 707 F.2d 1176, 1188 (11th Cir.1983); see Wooley v. Maynard, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1997). Constitutional harm is not necessarily synonymous with the irreparable harm necessary for issuance of a preliminary injunction. See City of Los Angelesv. Lyons, 461 U.S. 95, 112 -13, 103 s. Ct. 1660, 1671, 75 L.Ed.2d 675 (1983).

RELEVANT LEGAL STANDARDS FOR AND APPLICATIONS TO MERITS OF COMPLAINT

1. CONGRESSIONAL RECORD – SENATE, JUNE 19, 1964:

THE CIVIL RIGHTS ACT

The following comments were provide by Senator McCarthy of Minnesota:

"These rights were claimed on the basis of the nature of man and the nature of a person. All of these rights to which we now refer today, on another occasion were declared to be inalienable rights of all men. These civil rights do not derive because of law but, rather, derive from the very nature of man himself. They have their basis and they rest in that nature. We have made these basic human

rights civil rights, and we have sought to guarantee and protect them through the Constitution of the United States and of the States, and through the laws of the land.

2. PUBLIC LAW 88-352 (JULY 2, 1964)
TITLE VII – EQUA LEMPLOYMENT OPPORTUNITY

OTHER UNLAWFUL EMPLOYMENT PRACTICES

Sec. 704. (a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees ..... because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investi gation, proceeding, or hearing under this title.

VETERANS PREFERENCE

Sec. 712. Nothing contained in this title shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans.

3. International Bro. of Teamsters v. United States, 97 S. Ct. 1843 (1977),

" Disparate treatment such as is alleged in the present case is the most ea sily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be i nferre d from the mere fact of differences in treatment. See, e.g., Arlington Heights v. Metroplitan Housing Dev. Corp., 429 U.S. 252, 265 -266, 97 S. Ct. 555, 563-565, 50 L.Ed.2d 450. Undoubtedly disparate treatment was the most obvious evil Congress had

in mind when it enacted Title VII. See, e.g., 110 Cong. Rec. 13088 (1964) (remarks of Sen. Humphrey)."

4. Cox v. American Cast Iron Pipe Co., 11th Cir. (1986), 784 F.2d 1546

Job titles and duties themselves are conditions of employment protected by Title VII, and thus, Title VII plaintiff does not have to show economic loss to prove discrimination.

5. Harris v. Forklift Systems, Inc. , 114 S. Ct. 367 (1993)

Title VII's prohibition against discrimination with respect to "terms, conditions, or privileges of employment" based on race, color, religion, sex, or national origin is not limited to economic or
tangible discrimination, but extends to entire spectrum of disparate treatment of men and women in employment, which includes requiring people to work in discriminatory hostile or abusive environment.

Mertor standard for determining whether conduct is actionable under Title VII as "abusive work environment" harassment requires objectively hostile or abusive environment – on ethat reasonable person would find hostile or abusive – a swell as victim's subjective perception that environment is abusive; conduct that is not severe or pervasive enough to create objectively ostile or abusive environment is beyond Title VII's purview, as is conduct that victim does not subjectively perceive as abusive.

To be actionable under Title VII as "abusive work environment" harassment, conduct need not seriously affect employee's psychological well-being or lead employee to suffer injury, so long as environment would reasonably be perceived, and is perceived, as hostile or abusive; focusing on employee's psychological well-being or whether employee suffered injury could unnecessarily focus fact finder's attention on concrete psychological harm, which Titl eVII does not require.

Whether work environment is "hostile" or "abusive" in violation of Title VII can be determined looking only at all the circumstances, which may include frequency of discriminatory conduct, its severity, whether it is ph ysically threatening or humiliating, or merely offensive, and whether it unreasonably interferes with employee's work performance; effect on employee's psychological well -being is relevant in determining whether victim actually found environment abusive, but that factor, like any other relevant factor, may be taken into account and no single factor is required.

6. Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257 (1998)

When employee proves that tangible employment action resulted from refusal to submit to supervisor's sexual demands, he or she establishes that employment decision itself constitutes change in terms and conditions of employment that is actionable under Title VII; however, for any sexual harassment preceding employment decision to be actionable, conduct must be severe or pervasive.

Employer may be liable for both negligent and intentional torts committed by employee within scope of his or her employment.

Employer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it.

Tangible employment action taken by supervisor becomes for Title VII purposes the act of employer.

Employer is subject to vicarious liability to victimized employee for actionable hostile environment crea ted by supervisor with immediate (or successively higher) authority over employee; when no tangible employment action is taken, employer may raise affirmative defense

to liability or damages, subject to proof by preponderance of the evidence.

Employer's affirmative defense to vicarious liability for supervisor's creation of hostile work environment comprises two necessary elements: (a) that employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by employer or to avoid harm otherwise. Employer has no affirmative defense to vicarious liability for supervisor's harassing conduct in violation of Title VII when supervisor's harassment culminates in tangible employment action, such as discharge, demotion, or undesirable reassignment.

DOCUMENTATION UPON WHICH PLAINTIFF INTENDS TO RELY FOR INJUNCTIVE RELIEF

Rules of the United States District Court for the Middle District of Florida:

Preliminary Injunctions - Rul e4.06(b)

In order to develop a record and the positions of the parties in advance of the hearing –

(2) Service of all papers and affidavits upon which the moving party intends to rely must be made .....

Speed is often extremely important in proceedings for restraining orders and temporary injunctions, and both the movant and the opposing party are often unable to obtain and marshal their evidence in a manner that would be proper for a summary judgment hearing or for an actual trial ..... But the court may properly consider affidavits at preliminary injunction hearings which do not measure up to the standards of

the summary judgment affidavits. Kennedy v. Sheet Metal Workers Int. Ass'n Local 108, D.C. Cal. (1968) 289 F. Supp. 65 .

In addition to the standards for injunctive relief presented in *Canal Authority of State of Florida v. Callaway* ; Plaintiff will present documentation in support of the "genuinely extraordinary situation" and "irreparable injury" standards as presented by the United States Supreme Court in *Sampson v. Murry* ; and the "capable-of-repetition" doctrine as presented in *City of Los Angles v. Lyons.*

EXCERPTS FROM COMPLAINT FILED WITH THIS COURT

Plaintiff is currently and has been an employee (Internal Revenue Agent) of the Defendant for nineteen years. Plaintiff, who has never been the subject of disciplinary action by the Defendant, has consistently received outstanding annual performance evaluations and commendations from the Department of Justice/National Office Internal Revenue Service. See Exhibit A.

In 1991 an IRS manager (Ron Prowler) did threaten Plaintiff with physical injury when Plaintiff refused his request for a listing of confidential informants. Plaintiff reported the threat to the Division Chief (Terry Hallihan). See Exhibit B.

Additional comments:

1. Mr. Prowler became violent without provocation and was continuously shouting at Plaintiff as he put his fist in front of Plaintiff's face and backed Plaintiff against a row of file cabinets September 23, 1991.

2. Another person was present during a portion of the incident on September 23, 1991 and will testify as to Mr. Prowlers demeanor and what Mr. Prowler was demanding a copy of. This person will be deposed during the discovery process.

3. The National Treasury Employees Union Chapter President became involved with internal revenue service management subsequent to the incident and relevant documentation will be subpoenaed by Plaintiff.

4. Mr. Prowler called Plaintiff within two days of the incident and apologized for his actions which he described as "inappropriate". Please refer to Exhibit C (EEOC decision dated 12/5/96) which indicates that Mr. Prowler apologized for the incident.

5. Plaintiff will at this point correct some misrepresentations contained in Defendant's Memorandum in Support of its Response to Plaintiff's Application for Preliminary Injunction - Par tA :

   a. The examination of the "high profile taxpayer" was initiated in 1988 (not 1991).

   b. Mr. Prowler did not discover the database. He was advised of said database during a four days conference in January, 1991 at which Plaintiff was the instructor.

   c. Mr. Prowler could not have "believed the data base to be an improper one". Internal revenue service National Office Disclosure

Litigation had reviewed the database on a number of occasions and determined it to be completely proper. This will be confirmed by the Disclosure Office in Atlanta during the discovery process.

d. Plaintiff never refused access to the database to Mr. Prowler or any other internal revenue service persons. As Plaintiff explained to Mr. Prowler on 9/23/91, he would be provided a copy of the database absent the confidential informants.

6. Mr. Prowler came to the Division in 1990 and Plaintiff only met or talked to him on four or five occasions prior to 9/23/91. Plaintiff was generally on the road and his contact person on the "high profile taxpayer" was Bill Pheil per instructions of the Division Chief. Mr. Prowler was never involved in the examination. Plaintiff was very much surprised by Mr. Prowler's violent behavior on 9/23/91 as Plaintiff didn't know him and he didn't know Plaintiff..

   Plaintiff has been in contact the Division Chief who worked directly with Plaintiff in the examination of the "high profile taxpayer" from 1988 to 1991. He will testify as to the positive working relationship which did exist throughout the period.

7. Mr. Prowler's predetermined replacement as group manager (Melanie Clark) was a good friend of Mr. Prowler's having worked together in Miami. Ms. Clark's attitude toward Plaintiff changed after the 9/23/91 incident and she harassed Plaintiff until her resignation as group manager in December 1993. On October 14, 1993 Plaintiff did file a complaint of employment

discrimination against Mr. Prowler and Ms. Clark; however the complaint was withdrawn in December 1993 upon the resignation of Ms. Clark. Plaintiff incorrectly assumed that Mr. Prowler wouldn't be able to get to him once Ms. Clark was gone.

During the years 1991, 1992, 1993 Plaintiff was assigned very small grade 13 examination by Mr. Prowler and Ms. Clark (i.e. minimun gross receipts and assets). No large and complex examinations were assigned to Plaintiff.

On September 18, 1995 Plaintiff notified (verbally and in writing) the new Division Chief (Pat Cox) of the previous threat by Mr. Prowler and requested that Mr. Prowler not be assigned supervisory authority over Plaintiff.

On September 21, 1995 Mr. Prowler met with Plaintiff's (then) current Manager (Genny Farley) and reportedly went into a long dissertation on how much he hated Plaintiff and stated "he would push (Plaintiff) down a flight of stairs if he thought he could get away with it". Ms. Farley was concerned over the safety of Plaintiff and immediately informed Plaintiff of the threat. Ms. Farley reportedly informed the Division Chief a few days later. Plaintiff called the internal revenue service Inspection Service and was informed that nothing could be done unless Mr. Prowler assaulted Plaintiff.

On December 19, 1995 Plaintiff filed a discrimination complaint under 29 CFR PART 1614 with the Department of the Treasury (Agency). Plaintiff's complaint was not accepted by the Agency and the EEOC affirmed the dismissal of the complaint on the following basis -

"a complainant must point to an 'injury in fact' in order to be aggrieved. Simple conjecture as to alleged future injury is not sufficient".

Additional comments:

1. The memorandums and correspondence in Exhibit C reflect Plaintiff's concerns relative to the direct and indirect threats by Mr. Prowler. The comments by Mr. Prowler and the concerns/ actions of Ms. Farley will be presented upon discovery; however it should be noted that Ms. Farley has already made a statement relative to the threatening comments by Mr. Prowler against Plaintiff (EEOC decision 12/5/96 in Exhibit C). The comments by Ms. Farley will also be affirmed by the Union Steward, the EEO Counselor, and the Plaintiff.

2. On 10/1/95 Plaintiff was transferred to another group such that he would not be under the direction and control of Mr. Prowler. Plaintiff again incorrectly assumed that Mr. Prowler would not be able to get to him.

Plaintiff did make written requests of Defendant to avoid all contact with Mr. Prowler; however said requests were denied by Defendant. **See Exhibit D.**

Effective October 1, 1997 Mr. Prowler received a promotion which resulted in a demotion for Plaintiff in his assigned duties (no effect upon

compensation). Plaintiff was informed in writing by the Division Chief (Pat Cox) that the only way Plaintiff would be permitted to continue conducting examinations of the largest and most complex entities was to make application to work for Mr. Prowler.

On November 18, 1997 Plaintiff filed a third discrimination complaint with the Agency under 29 CFR PART 1614 based upon a claim of retaliation by internal revenue service management for the 1995 complaint filed with the EEOC.

The third discrimination complaint (retaliation), which was accepted by the Agency, is directly and transactionally related to the initial discrimination complaints in that the Defendant ignored and accepted the threats by Mr. Prowler against Plaintiff and then maliciously required Plaintiff to work under the supervision of Mr. Prowler if he wished to perform the same types of examinations which he had conducted under the supervision of other managers during the period February 1989 through September 1997. See Exhibit E.

Since October 1, 1997 Plaintiff has been assigned the equivalent of one months work which was limited to the examination of very small entities.

The Defendants prohibited retaliatory action has taken form in the manipulation of Plaintiff's employment conditions (assignments/duties) such as to constitute harassment.

The record clearly demonstrates that were it not for the appointment of Mr. Prowler as the

manager of those employees conducting examinations of the largest and most complex entities, Plaintiff would not have been excluded from said examinations. Plaintiff has therefore suffered a personal loss or harm with respect to a condition of employment. See Exhibit F.

Additional comments:

1. From October 1, 1997 to the present Plaintiff has been working under the direction and control of Teresita M. Rodriguez. Prior to 1990 Ms. Rodriguez worked for Mr. Prowler in another Division of the internal revenue service in Miami. In anticipation of becoming the manager of the group conducting examinations of the largest and most complex tax-exempt organizations in Florida, Mr. Prowler did recruit and promote the selection of Ms. Rodriguez to fill the group manager position he was about to vacate.

2. Please refer to the Standard Position Description for Plaintiff's position on March 27, 1989 and March 25, 1998 within Exhibit F. Article 26, Section 3A of the Internal Revenue Service/ National Treasury Employees Union Contracts state that the position description for each position will accurately reflect the actual duties, responsibilities and the supervisory relationships pertaining to the employee filling that position. The Standard Position Descriptions remained unchanged from March 27, 1989 through March 25, 1998 and include the following phrases within the descriptive portion of Plaintiff's duties:

   "Conducts independent examinations of the largest and most complex exempt organizations".

"Prepares the audit plan and acts as team leader in examinations of exempt organizations requiring team audit approach."

3. During the nine (9) year period beginning October 1, 1988 and ending September 30, 1997 Plaintiff did conduct 13,520 hours of examination time. Sixty-three percent (63%) of the examination time was devoted to six Coordinated Examination Program (CEP) qualified examinations (i.e. the largest and most complex). Thirty-one percent (31%) of the examination time was utilized for GS-13 non CEP qualified examinations and tax-exempt bond examinations. The remaining six percent (6%) of examination time was devoted to GS-12 examinations. All the GS-12 examinations and the majority of the small GS-13 examinations were assigned and conducted during 1991, 1992 and 1993.

4. During the period beginning October 1, 1997 to the present; Plaintiff has been assigned a limited number of very small GS-13 examinations under the general examination program. These types of returns have historically proven to have poor audit potential. The average gross receipts of said returns is approximately $5 million. This is in stark contrast to the $400 million to $1 billion in gross receipts at any point over the prior nine (9) year period when Plaintiff was permitted and did conduct examinations of the largest, most complex and most sensitive tax-exempt organizations. Mr. Prowler and Ms. Rodriguez are controlling the cases assigned to Plaintiff just as Mr. Prowler and Ms. Clark did in 1992 and 1993.

I. CONDUCT OF DEFENDANT SUBSEQUENT TO FILING OF COMPLAINT WITH THIS COURT

The Application for Preliminary Injunction and attached documentation reflect upon harassment which Plaintiff believes to have occurred subsequent to the filing of Complaint with this Court. **See Exhibit G.**

GENUINELY EXTRAORDINARY SITUATION

PLAINTIFF/EMPLOYEE

1. **CONGRESSIONAL RECORD – HOUSE, APRIL 17, 1944**

VETERANS PREFERENCE IN THE FEDERAL CIVIL SERVICE

From the very inception of our Republic our Government has extended certain special benefits and privileges to the men who have offered their lives in the defense of the country and its institutions. This is a sound principle. Those who are selected from among us to wear the uniform and to serve the country on the firing line are certainly entitled, when peace has been won through their efforts to be selected and given special consideration and preference by their Government in peacetime. That is a reward to an American who has willingly and gladly offered his life in an effort to save and to sanctify for us the principles of government under which we live, and which by their sterling efforts is being handed on to posterity.

USC TITLE 38 – VETERANS BENEFITS
CHAPTER 41, SECTION 4100: FINDINGS

The Congress makes the following findings:

(1) As long as unemployment and underemployment continue as serious problems among disabled veterans and Vietnam-era veterans, alleviating unemployment and underemployment among such veterans is a national responsibility.

A Copy of most recent Special Unemployment Study is attached as Exhibit H. In addition, please note copies of the most recent Annual Report by the Secretary of Veterans Affairs and the U.S. Census Bureau. The following findings were noted:

a) Persons with Plaintiff's disabilities represent 1% of the work force and only 27% of those persons are employed.

b) Only 2% of the service connected disabled veterans are rated at 100% disabled due to combat related injuries.

c) Veterans with 60% or higher service connected disability rating: 23% employed and 77% unemployed. Within the unemployed, 76% stated that their disability affected their ability to hold a job.

Plaintiff is 100% service connected disabled veteran qualified and receiving Veterans preference under USC Title 5 (Government Organizations and Employees) Subpart A, Chapter 21, section 2108(3)(c). See Exhibit I.

DEFENDANT/EMPLOYER

Please note the discussion of the abusive culture which exists within management at the Internal Revenue Service per testimony of Deputy Assistant Inspector General for Investigation, Department of the Treasury and Chief, Employee and Labor Relations Section, Personnel Branch, internal revenue service. These are not disgruntled employees, but rather Departmental witnesses acknowledging the abusive practices of internal revenue service management at Hearings Before the Committee on Finance United States Senate (April 28, 1998). See Exhibit J.

CONGRESSIONAL RECORD – SENATE, OCTOBER 3, 1997INTERNAL REVENUE SERVICE HEARINGS

The checks and balances system is not just constitutional philosophy. It is a practical safeguard for liberty.

In other words, the checks and balances that our forefathers put into the American system, so that, to get at the first conclusion he made that power corrupts , the understanding of that, the forefathers created a government in which one branch was always looking over the other.

EXCERPTS FROM COMPLAINT FILED WITH THIS COURT

Plaintiff is a disabled Viet Nam veteran with two artifical legs and the loss of use of one hand.

The threats by Mr. Prowler and the protection afforded him by defendant have taken a toll upon Plaintiff both mentally and physicially over the past seven years.

Plaintiff continues to fear the violent nature of Mr. Prowler.

THREAT

A menace; especially, any menace of such a nature and extent as to unsettle the mind of the person on whom it operates, and to take away from his acts that free and voluntary action which alone constitutes consent. United states v. French, D.C. Fla., 243 F. 785.

A declaration of one's purpose or intention to work injury to the person, property, or rights of another, with a view of restraining such person's freedom of action. McKenzie v. State, 113 Neb, 576,204 N.W. 60.

The threats by Mr. Prowler against Plaintiff in 1991 and 1995 were very serious. The threats by Mr. Prowler were physical (inflict pain) as opposed to administrative (demotion, suspension, etc.). The threats were directed to Plaintiff's most vulnerable characteristic (i.e. disability). According to the Penalty Guidelines in the Handbook of Employee Conduct and Ethical Behavior Mr. Prowler shold have been reprimanded for the 1991 incident and dismissed for the 1995 incident; however given the culture which existed then and continues to exist within internal revenue service management , he was protected and promoted. Plaintiff has been harassed and retaliated against for reporting the threats. The conduct is consistent with the findings of the Senate Finance Committees relative to the internal revenue service.

CONCLUSION

Plaintiff submits that the required judicial standards have been met to enable the Court to provide injunctive relief:

1. This Complaint reflects a "genuinely extraordinary situation". Irreparable injury sufficient in kind and degree to intercede in the process by which the Government "handles its own affairs" .

   One of the problems Plaintiff is having difficulty with is reconciling the negative effect this Government has had on his life. Thirty years ago Plaintiff fought and paid for his Constitutional right not to be afraid of being injured. Mr. Prowler (acting within the provisions of the abusive management culture within the internal revenue service) did violate Plaintiff's substantive and procedural due process fundamental liberty rights under the provisions of the Fifth Amendment. As a 100% service-connected disabled veteran Plaintiff had a Constitutional right not to be threatened with physical injury under the analysis presented by the United States Supreme Court in *Washington v. Glucksberg.* That right has been violated and neither Defendant nor the Court can eliminate the hurt and anger of the past; however the Court can provide injunctive relief to the future.

   Given the abuses of the past and the failure of the internal revenue service to address them; the statement presented during the Senate Hearings on the Internal Revenue Service provides direction:

   > The checks and balances system is not just constitutional philosophy. It is a practical safeguard for liberty.

2. The merits of the Complaint are well documented and will continue to improve via the discovery process.

3. The American public has an interest in protecting the rights of a 100% disabled veteran.

4. The capable-of-repetition doctrine exists based upon the history of abuse and the internal revenue service management culture which exists. For over seven years Mr. Prowler has either threatened Plaintiff directly or indirectly or used others to harass and retaliate against Plaintiff.

Plaintiff presents the following precedent in response to Defendant's reference to the Merit Systems Protection Board :

Merit Systems Protection Board did not possess subject matter jurisdiction over former Postal Service employee's mixed case appeal regarding his removal from Postal Service where, prior to his appeal to Board, former employee amended civil complaint in district court to include cause of action challenging his removal based on same discrimination allegations. Connor v.. U.S. Postal Service, 15 F.3d. 1063 (Fed. Cir. 1994).

WHEREFORE, Plaintiff respectfully requests permission of this Court to file this additional memorandum in support of the Request for Preliminary Injunction.

"S/Melvin E. Blough" pro se

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Melvin E. Blough,

Plaintiff,

v. Case No. 98-1358-CIV-T-24(E)

Robert E. Rubin, Secretary of the Treasury,

Defendant,

MOTION

Plaintiff requests permission of the Court to file an additional memorandum in support of the motion for preliminary injunction for the purpose of providing a record and stating Plaintiff's position in advance of the scheduled hearing.

Respectfully submitted,

"S/Melvin E. Blough" pro se

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Brandon, FL 33511
(813) 651-2778

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been hand delivered to a person authorized to receive on behalf of Assistant United States Attorney Roberta M. Bahnsen at Suite 3200, 400 North Tampa Street, Tampa, FL. this sixteenth day of February, 1999 in accordance with Federal Rule of Civil Procedure 5.

"S/Melvin E. Blough" pro se